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The Architecture of Accreditation

Jay Conison*

ABSTRACT: Accreditation systems can be analyzed in terms of the designer's choices in three dimensions. One dimension is purpose of accreditation, where purpose may relate to program quality or quality of outcomes. The second dimension consists of types of accreditation norms used to achieve these purposes. There are five principal types of norms available in this dimension: process-quality norms, output norms, power-allocation norms, self-determination norms, and consumer-protection norms. The third dimension consists of degree of regulation, which includes prescriptiveness or extensiveness of regulation. A sound accreditation system will make choices along each of these three dimensions. Understanding the range of possible structures helps one design, revise, and effectively analyze accreditation systems.

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I. INTRODUCTION

This Essay will analyze the architecture of law school accreditation by developing a set of concepts and a framework for understanding actual and possible law school accreditation systems. The concepts and framework presented here are grounded in a view of law school accreditation systems as regulatory structures designed to promote one or more purposes involving quality through regulatory methods selected from a well-defined portfolio. This Essay's concern is not with answering specific substantive questions—such as whether a law school accreditation system should require schools to have particular types of office space or should prescribe certain elements of the curriculum. Rather, its concern is with exploring more theoretical questions about the types of accreditation systems that are possible and the ways in which those systems can be structured. While our focus is primarily on the U.S. system of law school accreditation, the concepts and conclusions developed here have broader application.

Although largely theoretical, the discussion in this Essay has practical application as well. Law school accreditation today is a lively field for both action and debate. Outside the United States, new systems of law school accreditation are being developed in response to changes in government, the legal system, and the overall structure of higher education.¹ In the United States, significant changes in the scope and substance of law school accreditation are actively being considered. These possible changes include reorienting the law school curriculum to emphasize learning outcomes, strengthening the requirements of academic freedom, and extending accreditation under the American Bar Association's Standards for Approval of Law Schools to a limited number of schools outside the United States.²

The proposals in the United States, in particular, have prompted an enormous amount of discussion. Much of the discussion centers on recommendations concerning specific accreditation Standards. However, some of the discussion also involves a general critique of the current system of accreditation. Some say that the current system is too stringent; some say it is too weak. Claims are made that certain groups in the legal education community control or seek to control the accreditation Standards. The accreditation system is claimed to stifle innovation. It is said to permit too many accredited law schools or to permit law schools to produce too many graduates.

1. For a thoughtful proposal for a law school quality assurance or accreditation system, which also reviews developments in several other countries, see COUNCIL OF AUSTRALIAN LAW SCH., STANDARDS FOR AUSTRALIAN LAW SCHOOLS (2008), *available at* http://www.cald.asn.au/docs/Roper_Report.pdf.

2. See *Standards Review Committee*, AM. BAR ASS'N, <http://apps.americanbar.org/legaled/committees/comstandards.html> (last visited Apr. 7, 2011).

Despite the wealth of viewpoints and the many thoughtful arguments, participants in the discussion rarely step back from the proposals and arguments and place them in a larger context. What does it mean for an accreditation system to be strong or weak? How can one gauge whether a strong or weak system is desirable? What is the full range of alternatives to which a proposed new or modified standard can be compared? How can one assess whether a standard or set of standards is congruent with the system's ultimate purpose? These and other background questions are rarely asked or answered.

Law school accreditation is important to academics, lawyers, state supreme courts, the legal profession, and society as a whole. We understand the practical issues, and we know how to invoke policy considerations such as costs versus benefits of regulation. Yet we rarely undertake the type of conceptual inquiry we regularly pursue in connection with other legal and law-related subjects. This Essay seeks to address that absence of larger-scale conceptual treatment.

The practical goal here is to develop analytical tools for those who build, enforce, revise, and criticize accreditation standards and systems. To achieve this goal, the Essay will identify three dimensions of choice that underlie systems of law school accreditation and explore the choices available within these dimensions. This in turn will illuminate the range of possibilities for systems of law school accreditation and will provide a framework for criticism and analysis of accreditation systems and practices.

II. THE SECTION OF LEGAL EDUCATION AND LAW SCHOOL ACCREDITATION

As important as is the system of law school accreditation in the United States, many aspects are not well known; in particular, the character and function of the key committees and the procedures they follow in developing, enforcing, and revising norms. Hence, this Essay will briefly describe the current accreditation system. The discussion will help one understand recent developments in accreditation and how the concepts and framework later described in this Essay can be applied.

Accreditation is a species of regulation. Accreditation and related systems for quality assurance are not unique to law schools or to the United States. Accreditation is a worldwide practice that extends to a great variety of higher education institutions and programs. Accreditation can be carried out by governmental agencies that implement legal regulations or by private organizations that implement voluntarily adopted systems. The force of accreditation can reside in the legal consequences of compliance or noncompliance, or in the benefits of compliance or the disadvantages of noncompliance.

In the United States, higher education accreditation is carried out mainly by private organizations.³ These organizations establish and administer systems in which universities, other educational institutions, and programs voluntarily participate. The federal government regulates the accrediting organizations themselves through a process called “recognition” (in effect, an accreditation of accreditors), which ensures consistency and quality control in a highly diversified and decentralized educational structure.⁴

The recognized national accreditor of law schools in the United States is the Section of Legal Education and Admissions to the Bar (“Section”) of the American Bar Association (“ABA”). More specifically, the recognized accreditor is (jointly) the Council and the Accreditation Committee. Accreditation of a law school by the Section is a certification of quality, and it provides two important benefits. First and most important, it makes graduates of a law school eligible for admission to the bar in any state (upon meeting additional admissions requirements, such as passing a bar examination).⁵ Second, for law schools that are not units of a university, accreditation enables students to receive certain forms of federally sponsored financial assistance.⁶

To maintain its recognition by the Department of Education, an accreditor must undertake periodic, comprehensive reviews of its accreditation standards.⁷ In 2008, the Section began the required comprehensive review of its Standards for Approval of Law Schools (“Standards” or “ABA Standards”) and related sets of rules. The Standards Review Committee, a fourteen-member committee of legal academics, university officials, judges, practitioners, and public members, conducts the

3. For an overview of higher education accreditation in the United States, see 2 WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 644–48 (4th ed., student version 2006); and Judith Areen, *Accreditation Reconsidered*, 96 IOWA L. REV. 1471, 1477–84 (2011).

4. One non-governmental organization, the Council for Higher Education Accreditation (“CHEA”), also provides recognition to accreditors. The role of CHEA, although important, is not discussed in this Essay because the American Bar Association’s Section of Legal Education and Admission to the Bar has not sought recognition from CHEA.

5. Some states offer accreditation to non-ABA approved law schools located within the state, and some states permit graduates of non-ABA approved law schools to sit for the bar examination under limited circumstances. See, e.g., NAT’L CONFERENCE OF BAR EXAMINERS & AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2011*, at 10–13 (2011), available at http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/2011_CompGuide.pdf.

6. For a law school that is a part of a university, this latter benefit derives from accreditation of the university as a whole by a recognized institutional accreditor.

7. 34 C.F.R. § 602.21 (2010).

initial review.⁸ Legal academics never constitute more than fifty percent of the membership of the Standards Review Committee.⁹

The current review process is thoroughgoing and transparent. It is addressing a large number of specific Standards, as well as general questions about the scope and character of the accreditation system as a whole. Issues involved in this review include highly contentious ones relating to tenure, academic freedom, assessment of student learning, bar passage, and methods for evaluating applicants for admission to law school.¹⁰ The process is very open—meetings of the Standards Review Committee are public and well attended by interested parties; all drafts and proposals are posted on the ABA's web site; commentary is invited from any interested party; and written comments submitted by interested parties are posted on the web site.¹¹ This transparency is one reason for the great amount of current discussion about the appropriate character of law school accreditation and the scope and content of the system.¹²

The Standards Review Committee does not itself have the authority to adopt or revise Standards. Rather, it is charged only with making recommendations to the Council.¹³ The Council is the Section's executive body, and it alone has the authority to adopt and revise Standards or other rules or policy statements relating to law school accreditation. The Council also has ultimate authority to decide on the approval of new law schools.¹⁴

8. See Section of Legal Educ. & Admissions to the Bar, *Section Bylaws*, AM. BAR ASS'N (Aug. 7, 2010), http://www.americanbar.org/groups/legal_education/about_us.html (follow "Section Bylaws" hyperlink) [hereinafter "*Section Bylaws*"] (art. X, § 1(b)); see also Section of Legal Educ. & Admissions to the Bar, *2010–2011 Standards Review Committee*, AM. BAR ASS'N, <http://apps.americanbar.org/legaled/committees/comstandards.html> (follow "Committee Roster" hyperlink) (last visited May 10, 2011) (providing the name, position, and a short biography of each member of the Standards Review Committee).

9. This limitation on legal academics' membership, as well as comparable limitations for other Section committees described below, derives from a consent decree entered into by the U.S. Department of Justice and the ABA. See *United States v. Am. Bar Ass'n*, 934 F. Supp. 435 (D.D.C. 1996). For further discussion of the impact of the consent decree, see Areen, *supra* note 3, at 1488 & n.88.

10. See *Standards Review Committee*, *supra* note 2.

11. See *id.*

12. Interest in law school accreditation in the United States is episodic. The last major surge of interest was in the mid-1990s and was precipitated by several factors, including the antitrust litigation brought against the ABA. See generally Judith Welch Wegner, *Two Steps Forward, One Step Back: Reflections on the Accreditation Debate*, 45 J. LEGAL EDUC. 441, 441–42 (1995) (describing the increased interest in law-school accreditation and its sources).

13. STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. Standard 801(b), at 47 (2010) [hereinafter ABA STANDARDS & RULES], available at http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/2010-2011_standards/2010-2011aba_standards_and_rules_for_approval_of_law_schools.authcheckdam.pdf; *id.* Standard 803(d), at 49; *Section Bylaws*, *supra* note 8 (art. X, § 1(b)).

14. See ABA STANDARDS & RULES R. 8, at 73–74; *Section Bylaws*, *supra* note 8 (art. I, § 2(b)).

The Council is a twenty-one-member committee with no more than ten legal academics as members (non-academics—university officials, judges, lawyers, and public members—must constitute a majority).¹⁵ In addition to evaluating recommendations on new and revised Standards submitted by the Standards Review Committee, the Council may act on its own initiative to develop or revise Standards or request proposals from other committees within the Section.¹⁶ The procedure for adoption or revision of Standards involves a lengthy process of notice to and comment by interested and affected constituencies, which generally takes place over the course of a year. Public hearings are also required.¹⁷

The third major body of the Section that is central to the accreditation process is the Accreditation Committee. The Accreditation Committee has nineteen members, nine of whom are legal academics; the remainder includes judges, lawyers, university officials, and public members.¹⁸ The Accreditation Committee does not have policymaking authority; rather, it enforces the Standards.¹⁹ It does so in part through full review of every approved law school once every seven years.²⁰

As part of this process, a law school provides a large amount of information relating to its plans, organization, and operations. A fact-finding team then conducts an intensive on-site review and prepares a comprehensive report. The Accreditation Committee reviews the report along with the information submitted by the school and prepares a written decision letter describing the school's compliance with the Standards. The decision letter may also require follow-up reporting about the school's progress in correcting noncompliance with any Standard.²¹ The Accreditation Committee also makes recommendations to the Council regarding the approval of new law schools.²²

15. *Section Bylaws*, *supra* note 8 (art. IV, § 3); Section of Legal Educ. & Admissions to the Bar, 2010-2011 Council, AM. BAR ASS'N, http://www.americanbar.org/groups/legal_education/about_us/leadership.html (last visited May 10, 2011).

16. *See* ABA STANDARDS & RULES Standard 803(d), at 49.

17. *Id.* Internal Operating Practice 11, at 136.

18. *Section Bylaws*, *supra* note 8 (art. X, § 1(a)); *see also* Section of Legal Educ. & Admissions to the Bar, 2010-2011 Accreditation Committee, AM. BAR ASS'N, <http://apps.americanbar.org/legaled/committees/comaccredit.html> (last visited Apr. 7, 2011) (providing the name, position, and a short biography of each member of the Accreditation Committee).

19. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, THE LAW SCHOOL ACCREDITATION PROCESS 8 (2010) [hereinafter ACCREDITATION PROCESS], *available at* http://americanbar.org/content/dam/aba/migrated/legaled/accreditation/Accreditation_Brochure_October_2010.authcheckdam.pdf. The Accreditation Committee also makes recommendations to the Council regarding the approval of new law schools. ABA STANDARDS & RULES R. 8, at 73-74.

20. ABA STANDARDS & RULES R. 12(a), at 78-79.

21. *See id.* R. 3, at 70; ACCREDITATION PROCESS, *supra* note 19, at 8.

22. *See* ABA STANDARDS & RULES R. 5, at 72-73.

III. DEGREE OF REGULATION

In current discussions of both the present system of law school accreditation and proposals for change, a leading policy topic is the appropriate *degree of regulation*. Debate on this topic involves questions such as how much regulation there should be through the accreditation system, how prescriptive the various Standards should be, how much control the Section should assume over legal education, and how much autonomy or unregulated space schools should have in deciding how to educate students, run operations, and meet competition.

Positions on the appropriate degree of regulation are often linked to views on other issues. For example, a position that the degree of regulation should be low might be linked to a broader view that regulation of economic activity generally should be low, or to a belief that costs resulting from compliance with accreditation requirements are too high and unnecessarily increase the price of education to students. On the other hand, a position that the degree of regulation should be high might be linked to a view that strict standards are needed to limit the number of law schools and law graduates, or to a belief that without strong prescriptions, law school and university administrators would elevate financial considerations over considerations of programmatic quality, to the detriment of students and the public.

A decision on the issue of degree of regulation can seem fundamental and dispositive of a wide range of other issues. In part, this is because the general question of how a system of law school accreditation should be organized might seem tantamount to a set of specific questions, such as what level of prescription should there be regarding library collection, what level of prescription should there be regarding admission practices, and so forth, down a list of aspects of law school structure and operation. For each of these subjects, should there be no prescription? Should there be minimal prescription? Moderate prescription? High prescription? It can easily seem that a general determination of the appropriate degree of regulation for the system as a whole largely decides each particular question.

In effect, the view that degree of regulation is fundamental involves an implicit model of an accreditation system for law schools. The model is one in which a system lays down requirements about a well-defined set of topics relating principally to the operation of the law school and its educational program. The set of topics creates an outline of law school organization and operation—indeed, an outline of the model law school. The major policy question is one of how detailed this outline should be.

This implicit model of an accreditation system as a set of programmatic prescriptions results from a variety of factors. In part, it results from history—the ABA Standards have reflected the model in their arrangement for about forty years. The Standards are organized by topical chapters that create an outline of a law school: Organization and Administration; Program

of Legal Education; Faculty; Admissions and Student Services; Library and Information Resources; and Facilities.²³ The model has become familiar, and what is familiar can seem inevitable; thus, major questions about revision tend to concern adding, modifying, or removing prescriptions, and the rigor of the prescriptions.²⁴

The current revision process (like previous ones) maintains the existing topical organization, and is largely concerned with deleting or modifying existing requirements or adding new ones under the existing topical headings. Correspondingly, much of the commentary centers on the virtues or vices of these deletions, modifications, or additions, and about the appropriate degree of regulation.²⁵ A position in favor of a moderate degree of regulation would favor leaving the Standards much as they are now, with only minor tweaking. A position in favor of more stringent regulation would advocate more prescription, perhaps along the lines of what the Standards looked like twenty years ago. And a position in favor of low regulation might suggest eliminating many current Standards or lowering their demands.

Beyond history and familiarity, another source of the view that degree of regulation is central is the fact that people do not like to be told what they can or cannot do, and many Standards prescribe just that. Standards of this kind can seem meddlesome. As this Essay will explain, there are norms included in the Standards that are not prescriptions. However, the prescriptions, which deal mainly with organization and operation, tend to be the Standards that first come to mind when one thinks about accreditation, and so they become paradigmatic of the accreditation system as a whole. As a result, the question of degree of prescriptiveness seems to be the most fundamental and important large-scale question.

Degree of regulation is certainly one dimension of choice in developing or revising a system of law school accreditation. An accreditation system can be more or less detailed, more or less prescriptive, and can be guided by an

23. See generally ABA STANDARDS & RULES (providing guidelines for each of these key areas of a law school's organization).

24. Another example of this model can be found in the work of the Rule of Law Initiative of the American Bar Association ("ROLI"). This project gives assistance to countries with emerging legal systems, which sometimes includes assistance in the development of legal education and accreditation systems. ROLI developed a Legal Education Reform Index ("LERI") for use in these projects as a way of gauging the quality of legal education systems. LERI is organized topically, similar to the organization of the ABA Standards, and uses these topics as the guide for assessing systems of legal education. For an overview of the factors included in LERI, see *The Legal Education Reform Index: Factors*, AM. BAR ASS'N, http://www.abanet.org/rol/publications/legal_education_reform_index_factors.shtml (last visited Apr. 7, 2011). For an example of the application of the Index, see AM. BAR ASS'N, LEGAL EDUCATION REFORM INDEX FOR KOSOVO (2008), available at http://apps.americanbar.org/rol/publications/kosovo_legal_education_reform_index_05_2008_en.pdf.

25. For a discussion of the reduction in the prescriptiveness of the Standards over the past twenty years, see John A. Sebert, *ABA Accreditation Standards and Quality Legal Education*, 11 TEX. REV. L. & POL. 395 (2007).

overarching philosophy of either directiveness or laissez-faire. The choice along this dimension is important. But a choice as to degree of regulation is largely a matter of tuning a system that gets its substance elsewhere.

It is not necessary that an accreditation system contain, for example, prescriptions about writing courses or about deans. In general, an answer to the question of degree of regulation cannot supply the content of the accreditation system. Content must come from other considerations.

One source of content is the dominant purpose or purposes of the system. For example, if the dominant purpose of the accreditation system is to promote high rates of bar admission, it is arguably unnecessary to include norms regarding a law school's library collection. On the other hand, in such a system, it might be appropriate to have norms regarding bar exam preparation programs.²⁶

But dominant purpose is not the only source of a system's content. Even if one concludes that it is appropriate to have some provisions concerning library collection as a means of achieving system purposes, there still remains the question of the type of provision to be used. Prescribing systemwide requirements might not be deemed the best approach to regulating library collection. It might be thought better, for example, to require the school to articulate its library needs relative to its mission, strengths, and goals, and then to hold the school accountable for meeting its articulated goals. There are many forms that regulation of a subject matter might take, and systemwide prescriptions are only one.

Thus, a policy choice along the dimension of degree of regulation tempers regulatory content that derives from other sources, in particular from choices in two other dimensions: *purpose of accreditation* and *types of accreditation norms*. These two dimensions are implicitly recognized in discussions about accreditation, but they generally are not treated systematically. For a full understanding of the range of possibilities in accreditation systems, and for informed discussion of accreditation issues, one must understand the choices available and how they affect the structure

26. Another source can be rules of the recognition authority. For example, a federal regulation requires that the standards of any accreditor recognized by the Department of Education must "effectively address the quality of the institution or program" in a list of areas, including curriculum, faculty, and facilities. 34 C.F.R. § 602.16 (2010). The regulation does not specify how a set of accreditation standards should address the listed topics. The impact of this requirement on law school accreditation, however, should not be overstated; the regulation was adopted after the ABA Standards took their current general form. In fact, the principal effect of the regulation was the adoption of proposed Standard 215 (now Standard 509), which relates to consumer disclosure. See Frank T. Read, *Legal Education's Holy War Over Regulation of Consumer Information: The Federal Trump Card*, 30 WAKE FOREST L. REV. 307, 310-13 (1995). The CHEA recognition criteria determine some aspects of an accreditor's standards but do not contain a list comparable to the Department of Education's regulations. See COUNCIL FOR HIGHER EDUC. ACCREDITATION, RECOGNITION OF ACCREDITING ORGANIZATIONS: POLICY AND PROCEDURES 3-7 (2010), available at http://www.chea.org/pdf/Recognition_Policy-June_28_2010-FINAL.pdf.

of a system as a whole. Hence, this Essay now turns to a treatment of these two other dimensions.

IV. PURPOSE OF ACCREDITATION

Purpose of accreditation is a dimension of choice in structuring law school accreditation systems; yet it might seem that there really is no choice available because the generally recognized fundamental purpose of any accreditation system is *ensuring quality*. However, this statement of overarching purpose is too abstract. For it to have practical value, the meaning must be refined.

As an initial step, this is easy to do. Corresponding to the fact that law school education has two main purposes, educating students and providing students with the opportunity for entrance into the legal profession, there are two principal ways in which the fundamental purpose of ensuring quality can be made more specific and operational. It can be refined to mean either ensuring *quality of program* or ensuring *quality of outcomes*. Each choice leads to a different approach to accreditation.

A. QUALITY OF PROGRAM

The current ABA Standards make quality of educational program the dominant purpose, framing that purpose as ensuring “a sound program of legal education.”²⁷ As stated in the Preamble:

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.* Consistent with their aspirations, mission and resources, law schools should continuously seek to exceed these minimum requirements in order to improve the quality of legal education and to promote high standards of professional competence, responsibility and conduct.²⁸

The current Standards review process has generated proposals that reflect, and even strengthen, this programmatic purpose. One, for example, would add language expressly requiring a law school to “maintain a rigorous educational program,” thereby inserting the criterion of rigor.²⁹

27. ABA STANDARDS & RULES preamble, at viii.

28. *Id.* (emphasis added).

29. STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. Standard 301 (Draft Jan. 8–9, 2011), <http://apps.americanbar.org/legaled/committees/comstandards.html> (follow “Report of Subcommittee on Student Learning Outcomes” hyperlink) [hereinafter “PROPOSED STANDARDS & RULES”]. This language would be added to the existing Standard 301(a), which currently requires a law school to “maintain an educational program that prepares its students

It is important to recognize that a statement of purpose which simply invokes quality of educational program is not enough to fully clarify the system's purpose. To begin, there is the question of what is encompassed in "ensuring." In particular, a program-focused accreditation system can be concerned to a greater or lesser degree with assuring program quality at the present or ensuring continued or continually improving program quality in the future. The ABA Standards are concerned primarily with present quality, and this focus on the present, rather than the future, has been a frequent source of criticism.³⁰

In addition, there is the question of what "educational program" means. For example, despite the ABA Standards' general language concerning soundness of "program of legal education," the Standards are in fact concerned only with assuring a sound program of *J.D. education*. The Standards have little concern with the quality of LL.M programs or of any other degree or non-degree program that a law school might offer. They do not set standards for LL.M or other degree programs, and indeed emphasize that the Section does not accredit those types of programs.³¹

The reason for this limitation may be historical rather than strategic. In the United States, law schools evolved as single-program institutions: the post-undergraduate, professional J.D. Because of this single-program focus, there has long seemed no reason for the Standards to be concerned with any other program a law school might offer. For many years programs other than the J.D. were at most incidental to a law school's operation.

Today, however, many law schools have degree-granting programs other than the J.D. Moreover, some of these programs are large, and some (in particular, the LL.M for foreign-trained lawyers) are intended (like the J.D. program) to be a "gateway to the legal profession."³² As a result, there is increasing concern with ensuring quality in some of these other programs, and an important question now is whether the Section should provide quality assurance by accrediting some or all of them.³³ If the Council

for admission to the bar, and effective and responsible participation in the legal profession." See ABA STANDARDS & RULES Standard 301 (a), at 17.

30. See, e.g., Michael A. Fitts, *What Will Our Future Look Like and How Will We Respond?*, 96 IOWA L. REV. 1539 (2011).

31. ABA STANDARDS & RULES Standard 308 interpretation 308-2, at 28 ("Acquiescence in a degree program other than the first degree in law is not an approval of the program itself, and, therefore, a school may not announce that the program is approved by the American Bar Association.").

32. *Id.* preamble, at viii.

33. The Council has approved for notice and comment a proposed model Rule on admissions of foreign-educated lawyers and proposed criteria for ABA certification of an LL.M. degree for the practice of law in the United States. See SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR. ASS'N, REPORT 4 (2011), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20110420_model_rule_and_criteria_foreign_lawyers.authcheckdam.pdf (proposing

chooses to accredit other degree programs under the ABA Standards, then the purpose of the accreditation system would change, since the “educational program” at the heart of the Standards’ purpose would expand. With such an enlargement of purpose, there would have to be Standards to ensure the quality of these other programs.

B. QUALITY OF OUTCOMES

The second possible choice for refining quality-related purpose is ensuring quality of outcomes. This possible choice of purpose largely reflects the fact that law school is or can be instrumental—a means to an end—and that individuals ordinarily pursue law school with professional goals in mind. An accreditation system might take as its dominant focus one or more of those outcomes. It might do so either because of concern with protecting student expectations about outcomes or because of concern with protecting society’s (or a subgroup’s) ability to rely on law schools to produce graduates with a certain level of competence, knowledge, or experience.

Quality of outcomes, of course, is related to quality of program—one hopes that a quality program will contribute to quality outcomes, and quality outcomes should be achievable, at least in part, through quality programs. Yet the two types of dominant purpose are distinguishable because quality programs do not guarantee quality outcomes (for example, even well-trained students may fail the bar examination or fail to obtain employment because of character deficiencies), and quality outcomes can in some cases be achieved irrespective of program quality (for example, native test-taking ability or a strong bar review course might compensate for programmatic weaknesses). Thus, an accreditation system could concern itself primarily with outcomes and give only secondary attention to how institutions bring them about.

As with a dominant purpose relating to program quality, there are many possible refinements to a choice of dominant purpose relating to quality of outcomes. For example, an accreditation system could identify its dominant purpose as ensuring that graduates pass a bar examination or achieve other certification within two years of graduation, and leave it entirely to a law school to implement what it considers the best way to fulfill this purpose. An accreditation system taking this approach would look very different from the current system’s strong focus on J.D. program quality and on Standards regulating aspects of the educational process. Many other choices—such as outcomes relating to demonstrated competences, character, employment, or passage of a bar examination or other certification—are possible.³⁴ A choice

further oversight, short of accreditation, of LL.M. programs designed for foreign-educated lawyers).

34. For still further possibilities, see Ahmed Belal, Dean of the Faculty of Law, Cairo Univ., What Are the Goals and Objectives of Law Schools in Their Primary Role of Educating Students? What Are We Educating Our Students for?, Address at the International Association

as to such refinement will substantially affect the scope and content of the resulting system.

V. TYPES OF ACCREDITATION NORM

The third dimension of choices in developing a system of law school accreditation is the dimension of *types of accreditation norms* used to achieve the given purposes. Any regulatory system must choose which of the available regulatory tools it will use to influence conduct in the relevant domain.

There are five principal types of norms that might be used in law school accreditation systems: (1) process-quality norms, (2) outcome norms, (3) power-allocation norms, (4) self-determination norms, and (5) consumer-protection norms. These five categories are not elements of the eternal fabric of the universe; rather, they are practical and functional categorizations of means for effecting accreditation-related purpose.

A. PROCESS-QUALITY NORMS

One type of norm—and the most familiar for reasons discussed above—is the *process-quality norm*. This norm is based on a view of law school as an educational process and on a strategy for achieving quality-related purposes by prescribing characteristics of this process. Process-quality norms prescribe, for example, student qualifications, faculty characteristics and responsibilities, faculty requirements, and library character and function. An example of a process-quality norm in the ABA Standards is a norm prescribing essential parts of law school curriculum.³⁵ Some or all norms of this type are frequently called “input norms.” However, that term is not the most useful one because many, if not most, such norms address operational aspects of a system (e.g., facilities) that are not always inputs.

Extensive use of process-quality norms is closely associated with a dominant purpose relating to program quality. The reason is that these types of norm deal mainly with core aspects of the educational program, such as curriculum, or else with key environmental factors, such as classrooms. All of these aspects and factors can contribute to or detract from the quality of the educational program.³⁶ A system that extensively uses process-quality norms also tends to be associated with at least a moderate degree of regulation. By their nature, these norms prescribe the core

of Law Schools Conference: The Role of Law Schools and Law School Leadership in a Changing World (May 26, 2009), *available at* [http://www.ialsnet.org/meetings/role/papers/BelalAhmed\(Egypt\).pdf](http://www.ialsnet.org/meetings/role/papers/BelalAhmed(Egypt).pdf).

35. See ABA STANDARDS & RULES Standard 302(a), at 19.

36. The ABA is not the only law school accrediting body to adopt a system that makes extensive use of process-quality norms. One example from outside the United States is the legal-accreditation system in India. See *Education Rules 2008*, THE BAR COUNCIL OF INDIA, <http://www.barcouncilofindia.org/about/legal-education/education-rules-2008/> (last visited Apr. 7, 2011).

characteristics of law school organization and operation, and this kind of prescription requires a modicum of detail to be useful.

B. OUTCOME NORMS

A second type of norm is the *outcome norm*. The current Standards make only limited use of outcome norms. One example, however, is the Interpretation³⁷ requiring law school graduates—in the aggregate—to achieve a minimum level of success on bar examinations over a specified period of time.³⁸

Extensive use of outcome norms would be congruent with an outcome-based purpose for the accreditation system. Norms of this kind could be tailored to measure the relevant desired outcomes. It is important to note, however, that outcome norms and outcome purpose are not identical. Thus, outcome norms can properly be used in systems with a dominant program-quality purpose. For example, an accreditation system can use outcome norms to assess the quality of particular aspects of the program by measuring the results relating to those aspects and holding the law school accountable. This appears to be the strategy underlying recently proposed Standards for curriculum, which would require law schools to articulate learning outcomes and regularly assess student learning.³⁹ These proposed Standards do not reflect a change in the system's dominant purpose; rather, they reflect a belief that outcome norms may be better than process-quality norms in achieving the basic program-quality purpose in at least some areas of law school operation.

C. POWER-ALLOCATION NORMS

A third type of norm is the *power-allocation norm*. Institutions of higher education can be viewed as collections of interest groups, each competing with the others to realize the group's respective goals. Sometimes those goals are self-serving; sometimes they advance institutional or social purposes. Power-allocation norms can calibrate the competition among groups as a way to promote the dominant purpose of the accreditation system or to achieve other ends. The rationale for using them as regulatory tools is that the persons empowered by such norms will be able to promote core goals or values while partially or wholly shielded from adverse action by other persons or groups that might seek to advance contrary purposes or values.

37. In the current ABA Standards, there is not a sharp systematic difference between Standards and Interpretations, but the current Standards review process is attempting to establish one.

38. See, e.g., ABA STANDARDS & RULES Standard 301 interpretation 301-06, at 18–19 (requiring minimum levels of either first-time bar passage or eventual, often called “ultimate,” bar passage on the part of graduates).

39. These are reflected in proposed Standards 302 and 304. See PROPOSED STANDARDS & RULES Standard 302; *id.* Standard 304 (assessment of student learning).

The current ABA Standards contain many examples of power-allocation norms. For instance, the Standard requiring tenure for a dean is a power-allocation norm.⁴⁰ Its apparent purpose is to adjust the power of a dean relative to those who could cause his or her termination—in particular, the university administration—in order to help the dean promote the purposes of program quality against potential opposition or even threats. Analogous norms deal with security of position for library directors⁴¹ and clinical faculty members.⁴²

A different, more subtle, power-allocation norm is the Interpretation providing that physical facilities cannot be deemed inadequate unless they have a “negative and material effect on the education students receive.”⁴³ This norm modifies the process-quality norm which sets out general standards of adequacy for facilities.⁴⁴ The Council added this modification to the Standards as part of a review process initiated pursuant to an antitrust consent decree with the U.S. Department of Justice, and the norm was designed to adjust power between a law school and its university.⁴⁵ Specifically, it was designed to limit the ability of law schools to invoke the ABA Standards as a way to press universities for new or improved law school facilities.

Two related points are worth noting about power-allocation norms. First, an accreditation system that makes substantial use of power-allocation norms might be viewed as similar to a constitution. Just as with a constitution, an accreditation system that relies extensively on power-allocation norms will allocate authority, responsibility, and rights, and thereby create a framework for ongoing operation and institutional evolution. Power-allocation norms can replace process-quality norms by setting up a general structure for a law school and then leaving it to the participants to resolve how best to achieve the quality-related goals.

40. See ABA STANDARDS & RULES Standard 206(c), at 12 (requiring that a dean normally have a tenured faculty position).

41. *Id.* Standard 603(d), at 42.

42. *Id.* Standard 405(c), at 32; *id.* Standard 405 interpretation 405-6, at 33.

43. *Id.* Standard 701 interpretation 701-1, at 45.

44. See *id.*

45. The consent decree required the ABA to establish a special commission to review its accreditation process. *United States v. Am. Bar Ass'n*, 934 F. Supp. 435, 437–38 (D.D.C. 1996). The Commission's report recommended revising the basic facilities-accreditation Standard to include the “negative and material” language in order to limit the possibility of a law school using the accreditation process to pressure its university to provide new or improved physical facilities that might not be justified. COMM'N TO REVIEW THE SUBSTANCE & PROCESS OF THE AM. BAR ASS'N'S ACCREDITATION OF AM. LAW SCH., SUPPLEMENTARY REPORT 9–12 (1995), available at <http://apps.americanbar.org/legaled/accreditation/Wahl%20Supplement.pdf>. The Commission found no evidence of such abuse of the Standards but was sensitive to the possibility. *Id.*

Second, because power-allocation norms are specifically designed to adjust relations of authority and influence, they tend to provoke passionate discussion. And, indeed, the current process of review and revision of the ABA Standards is generating passionate discussion, in part because some proposals, including those related to the requirements of tenure and academic freedom, would revise power-allocation norms to reallocate the current balance of power.⁴⁶

D. SELF-DETERMINATION NORMS

A fourth type of norm is the *self-determination norm*. Such a norm governs an institution's determination of its own mission, values, goals, and measures of success. There is modest, but not insignificant, use of these norms in the current ABA Standards. One important example is the requirement that law schools engage in regular strategic planning and assessment.⁴⁷ The fact that this Standard (and a related one)⁴⁸ specifically deals with goal setting and assessment regarding the program of legal education reinforces the focus of the Standards on program quality.

One can also find another type of self-determination norm in the Standards. For example, one Standard requires a law school to have policies regarding full-time faculty members' responsibilities in teaching and other areas.⁴⁹ This Standard charges a school with developing its own norms within an area that might otherwise be the subject of a process-quality norm. Other Standards of this type charge law schools to set their own norms in other areas.⁵⁰ The degree to which the Standards require a law school to monitor or enforce its own policies under this type of norm varies considerably.⁵¹

The modest use of this type of norm in the current ABA Standards may derive in part from the fact that law schools have long been very similar to

46. See, e.g., Letter from Henry S. Bienen, President, Nw. Univ., to Hulett H. Askew, Consultant, Office of the Consultant on Legal Educ., Section of Legal Educ. & Admissions to the Bar, Am. Bar. Ass'n (Apr. 14, 2009), available at <http://apps.americanbar.org/legaled/committees/comstandards.html> (follow "University Presidents April 2009" hyperlink) (enclosing a statement made by fourteen university presidents regarding the Council's regulation of faculty employment); Statement, Soc'y of Am. Law Teachers, Society of American Law Teachers Statement on Tenure and Security of Position (July 19, 2010), available at <http://apps.americanbar.org/legaled/committees/comstandards.html> (follow "SALT, July 2010" hyperlink).

47. ABA STANDARDS AND RULES Standard 203, at 11.

48. *Id.* Standard 202, at 11.

49. *Id.* Standard 404(a), at 32.

50. E.g., *id.* Standard 304(d), at 22; *id.* Standard 304 interpretation 304-6, at 24.

51. For example, Interpretation 304-6 requires only that a law school enforce certain policies regarding students, *id.* Standard 304 interpretation 304-6, at 24, whereas Standard 404(b) requires periodic assessment of the extent to which faculty members satisfy articulated policies concerning their responsibilities, *id.* Standard 404(b), at 32.

each other in mission, program, and operations.⁵² As a consequence, process-quality norms have been deemed more appropriate for regulating these similar law school features. The situation may change if law schools continue to evolve away from homogeneity and develop very different missions and programs; in such case, self-determination norms may increasingly replace process-quality norms. Self-determination norms are already more common in institutional accreditation systems for colleges and universities—where mission and program differ substantially from school to school, and where the prevailing view is that quality judgments depend largely on institutional mission rather than on extrinsic prescriptions.⁵³

E. CONSUMER-PROTECTION NORMS

The fifth type of norm is the *consumer-protection norm*. Use of these norms is based on a view of students as consumers of educational services and promotes the goal of protecting students as such consumers. Extensive use of consumer-protection norms may be associated with a strategy of enabling students to make informed choices based on knowledge of relevant characteristics of schools and on how well the schools achieve relevant goals, so as to hold schools accountable for meeting quality purposes. This is especially true with respect to one subset of consumer-protection norms—*consumer-disclosure norms*.⁵⁴

At present, consumer-protection norms are little used in the ABA Standards. But there appears to be impetus for greater use of them, particularly consumer-disclosure norms. In part, this appears to reflect a preference for replacing process-quality norms with consumer-disclosure norms as a way of ensuring program quality through what is arguably a lesser degree of regulation.

However, some members of the legal education community have argued that there should be very strong disclosure norms, with the ABA serving as an auditor of information disclosed by law schools.⁵⁵ If adopted,

52. It may also result from the fact that law schools have difficulty setting goals and measuring attainment of them. See Jay Conison, *Success, Status, and the Goals of a Law School*, 37 U. TOL. L. REV. 23, 34 (2005).

53. Thus, for example, CHEA states that U.S. higher education accreditation is based on a core set of values and principles, including: “[h]igher education institutions have primary responsibility for academic quality; colleges and universities are the . . . key sources of authority in academic matters,” “[i]nstitutional mission is central to judgments of academic quality,” “[i]nstitutional autonomy is essential to sustaining and enhancing academic quality,” and “[t]he higher education enterprise and our society thrive on decentralization and diversity of institutional purpose and mission.” JUDITH S. EATON, COUNCIL FOR HIGHER EDUC. ACCREDITATION, AN OVERVIEW OF U.S. ACCREDITATION 3 (2009), available at http://www.chea.org/pdf/2009.06_Overview_of_US_Accreditation.pdf.

54. See, e.g., ABA STANDARDS & RULES Standard 509, at 38–39.

55. See, e.g., Memorandum from Dean Art Gaudio, Chair, Questionnaire Comm. to the Council of the Section of Legal Educ. and Admissions to the Bar, on the Report on Reporting

such a proposal would significantly change the fundamental purposes of the accreditation system to include, along with ensuring quality, protecting consumers. Unlike disclosure-related proposals under consideration in the Standards review process,⁵⁶ this proposal would move the system toward a higher degree of regulation.

VI. A NOTE ON OTHER NORMS

The five types of norms reviewed above are the principal regulatory tools for promoting the quality-related goals of a system. As will be explained below, they are also useful in categorizing possible approaches to accreditation systems. However, they are not the only norms an accreditation system might contain. For the sake of completeness, this Essay will briefly review several other types of norms that may also be found in an accreditation system but that are less important for categorization purposes.

A. INFORMATION NORMS

One important type of norm is the *information norm*, which governs collection of information by the accreditor or other relevant body. Norms of this kind are essential for enabling the accreditor to obtain data on the basis of which to enforce the regulatory norms. In the current ABA accreditation system, information about law schools is collected mainly through annual or other periodic reports submitted by schools and through periodic on-site visits by teams of volunteers.⁵⁷

Information norms can also be used for purposes other than enforcement. For example, they can be used to collect systemwide information that the various schools might use for benchmarking or to generate data that might inform the process of revision of the accreditation system.

B. CHANGE-MANAGEMENT NORMS

Another type of norm is the *change-management norm*. Law schools constantly evolve, if only to adapt to changes in their environment. Some changes are substantial, and some implicate compliance or potential for compliance with the main regulatory norms. An accreditation system may seek to manage some such changes through formal processes, and indeed, the Department of Education specifically requires a recognized accreditor to have certain change-management norms.⁵⁸

of Law School Placement Data to the Council of the Section of Legal Education and Admissions to the Bar (Mar. 8, 2011) (on file with author).

56. *E.g.*, PROPOSED STANDARDS & RULES Standard 306(a)–(b) (calling in part for a law school to disclose certain policies and practices that they voluntarily adopt).

57. *See* ABA STANDARDS & RULES Standard 101 interpretation 101-1, at 4; ACCREDITATION PROCESS, *supra* note 19, at 8

58. 34 C.F.R. § 602.22 (2010).

The present ABA Standards contain two change-management norms. One deals with “major” changes—substantial changes in the educational programs offered by the school, or in control or organization of the school or its parent institution; or changes through the establishment of additional campuses on which courses and programs can be offered.⁵⁹ The relevant Standard manages changes of this kind by granting “acquiescence”—in effect, permission—based on a school’s demonstration that the change will not adversely affect its core program of legal education.⁶⁰

The other change-management norm deals with law school activity that would violate one or more Standards, but which can be justified by special circumstances.⁶¹ The norm manages this type of change by permitting the grant of time-limited variances from compliance with one or more regulatory standards.⁶² This change-management norm is the means by which the accreditation system deals with experimentation by law schools that would otherwise violate one of the Standards.

C. JURISDICTIONAL NORMS

Jurisdictional norms are necessary for defining the scope of any accreditation system. One such norm is an *entrance norm*. This type of norm governs a law school’s entry into the accreditation system and its coming into compliance with the system’s substantive standards. The norm may involve an application process and possibly a probationary period. Other jurisdictional norms may govern the exit of a law school from the accreditation system, whether voluntarily or involuntarily.

D. SYSTEM AND PROCEDURAL NORMS

Finally, any accreditation system must have norms governing the organization of the system itself: *system norms*. Examples are norms identifying the body with the responsibility to oversee compliance with the substantive norms. A system must also have *procedural norms* for the ongoing operation of the system and for processes of the accrediting body.

VII. TYPES OF ACCREDITATION SYSTEMS

As the prior discussion shows, in developing or revising an accreditation system, one must make choices along three dimensions. The three dimensions (reordered so as to be more analytically useful) are: the dominant purpose of the system, the types of norms primarily used to achieve the purpose, and the degree of regulatory oversight. The choices in

59. ABA STANDARDS & RULES Standard 105, at 7.

60. *Id.*

61. *Id.* Standard 802, at 47.

62. *Id.*

these three dimensions can also be used to categorize various possible kinds of accreditation systems.

The current accreditation system for U.S. law schools is one that reasonably may be characterized as having a dominant focus on current J.D. program quality, using mainly process-quality norms and secondarily power-allocation and self-determination norms, and adopting a moderate degree of regulatory oversight. With regard to this last dimension, evaluating the degree of regulatory oversight is not scientific, and different people may characterize a system's level of regulation differently. But the degree of oversight reflected in the present Standards is lower today than it has been in the past, particularly in that many of the process-quality norms are less prescriptive.⁶³

For the most part, the proposals currently under consideration for revising the Standards retain the current J.D. program-quality focus.⁶⁴ They also retain a moderate degree of regulatory oversight. Some of the key proposals involve changes in power-allocation norms (e.g., proposals for general Standards relating to tenure and academic freedom)⁶⁵ and greater use of outcome norms (in particular, with respect to learning outcomes).⁶⁶ These and other proposed changes are important, and if adopted, could significantly affect the way legal education in the United States is carried out. Yet in the end, they remain changes within the existing model. By contrast, several other possible changes—not part of the formal Standards review process and currently in early exploration stages—could represent more profound changes to the accreditation system.⁶⁷

The present model for an accreditation system tends to be viewed as canonical. However, the analysis presented in this Essay helps show that other types of systems are possible. A way to appreciate the range of potential systems is to build on current strands in discussions of law school accreditation in the United States. Thus, one alternative would be to premise a system on ensuring current quality of all degree programs offered by a law school (whether or not the degrees are directed toward law practice), continuing to rely mainly on process-quality norms, and adopting a lower degree of regulation. Or, to take another example, a system might focus more heavily on promoting improvement of the quality of a J.D.

63. See Sebert, *supra* note 25, at 395–96.

64. See *supra* notes 2, 30 and accompanying text.

65. See SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR STANDARDS REVIEW COMM., AM. BAR ASS'N, SECURITY OF POSITION, ACADEMIC FREEDOM AND ATTRACT AND RETAIN FACULTY (2011), <http://apps.americanbar.org/legaled/committees/comstandards.html> (follow “Report of Subcommittee on Academic Freedom and Status of Position” hyperlink under “January 8–9, 2011” heading).

66. See PROPOSED STANDARDS & RULES Standard 302.

67. For example, a proposal for the enlargement of the accreditation system to encompass certain LL.M. programs could shift the system's purpose. See *supra* note 33.

program, rely mainly on outcome and self-determination norms, and adopt a lower degree of regulation. Or, to take yet another approach, a system might take as its dominant purpose quality in outcomes relating to bar passage and legal employment, rely mainly on outcome and consumer-protection norms, and adopt a low degree of regulation. Any of these three approaches would yield a different type of accreditation system than that now exists for U.S. law schools. Still other approaches are at least conceptually possible.

It is doubtful that any one approach can credibly claim inherent superiority to the others. One's view of the virtues or vices of an accreditation system will depend on preferences concerning goals and the ultimate purpose of the system, preferences for and experience with various regulatory approaches, and an assessment of costs and benefits of various degrees of regulatory oversight. Still, appreciating the range of possibilities and alternatives can better inform the process of developing and revising accreditation systems.

VIII. CODA: DISCOURSE ABOUT ACCREDITATION

Appreciating the dimensions of choice and ranges of possibilities can also better inform discussion about accreditation. Answering the most difficult and important questions about accreditation requires that one pay attention not only to particular Standards in isolation and the intensity of regulation, but also to the purpose of accreditation and to the appropriate tools for achieving quality-related goals.

This Essay will conclude with three observations concerning discourse about accreditation and accreditation-system change. First, the range of possibilities includes not just the rewriting or repeal of existing Standards, or the addition of new Standards on new topics, but as well systematic rethinking of the purpose of the accreditation system and the appropriate tools for achieving that purpose. A different *type* of system is at least a logical possibility. This is not to suggest that one should always seek radical change, but it is to suggest that one should be attentive to the full range of possibilities. As a practical matter, it is also to suggest that there may be value in looking to law school accreditation systems outside of the United States, as well as to accreditation systems for other types of educational programs.⁶⁸

Second, in thinking and arguing about particular Standards, one must remember that not all norms take the same form. In particular, not all Standards are prescriptive and not all Standards deal with process quality. It is important to understand the kind of Standard one is dealing with in order

68. In fact, the current Standards Review Committee has considered accreditation systems for other professional disciplines in the United States. See *Materials on Accrediting Agencies*, AM. BAR ASS'N, <http://apps.americanbar.org/legaled/committees/Standards%20Review%20documents/Materials%20on%20Accrediting%20Agencies.DOC> (last visited Mar. 1, 2011).

to appropriately evaluate it and identify alternatives. Returning to an earlier example, the “negative and material effect” requirement is less a prescription about facilities than an allocation of power between the law school and the university.⁶⁹ Thus, in critiquing this requirement or thinking about alternatives, the key question is not so much the proper degree of prescriptiveness as it is adjusting one aspect of the law school–university relationship.

Another example that reflects the importance of recognizing the many types of available norms is the proposal (now being seriously considered) to modify or eliminate the Standard requiring a valid and reliable test for admission to law school.⁷⁰ This Standard is a process-quality norm. If one thinks about the range of possible modifications only in terms of other process-quality norms, then the discussion will be limited to the assessment methodologies the system might prescribe. But other kinds of Standards are available—in particular, consumer-protection norms or self-determination norms. A richer conversation will result from appreciating this wider range of alternatives.

Third and finally, a good deal of current discussion involves charges that one group or another has control over accreditation or over some or all of legal education. The ABA—or more precisely, the Section of Legal Education—is sometimes claimed to control legal education. Law deans are sometimes said to control accreditation or legal education—or, at least, are accused of trying to gain control through the current Standards review process. Librarians, clinicians, and others are also the subject of such charges about control.

The notion of control is misleading and unhelpful. From a process point of view, it is surely wrong. The law school accreditation system is developed and administered through the work of a large and heterogeneous group of volunteers and participants. The Standards themselves are the synthesis of a wealth of viewpoints, and are enforced by committees with continually changing membership that at any time is highly diverse in experience, role in legal education (if any), and outlook. Just as within a law school, there are many persons or groups with influence, but no one person or group that can be said to control.⁷¹

From a substantive viewpoint, the notion that the Standards control law schools or legal education is rooted in the model of accreditation as a set of prescriptions that tell law schools what to do or not do and impede freedom

69. See *supra* notes 43–45 and accompanying text.

70. STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. Standard 503 (Draft Nov. 7–8, 2010), <http://apps.americanbar.org/legaled/committees/comstandards.html> (follow “Report on Subcommittee on Student Learning Outcomes (redline to previous draft)” hyperlink) (deleting Standard 503); see ABA STANDARDS & RULES Standard 503, at 36.

71. By contrast, a government-controlled accreditation system in an authoritarian regime could control legal education in a very clear sense.

and action. As a result, the Standards are viewed as heavy-handed regulation, dictating behavior, and punishing deviation—and doing so unnecessarily because the people affected know better than the accreditors what is best for their schools and for legal education.

But this view of the Standards is too simplistic. There are, indeed, prescriptions. But there are also Standards that empower, Standards that measure, and Standards that channel the process of goal setting and self determination. The system of Standards is complex, and prescriptions make up only one part of it.

The law school accreditation system is not a penal code, but a playing field. At any given moment, large-scale goals for legal education are pursued through a variety of tools and techniques. The playing field, moreover, is not static. Over time, the goals, tools, and techniques are assessed and adjusted through the exchange of ideas and through knowledge gained from experience. The more we appreciate that the accreditation system is dynamic, that it must be grounded in an articulated purpose, that it must make choices about methods, and that it can do more than just prescribe; the better we can make the system, the better we can make legal education, and the more constructively we can converse and argue about accreditation.