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ACCREDITATION AND RELIGIOUSLY AFFILIATED LAW SCHOOLS

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It is an honor to participate in this discussion of the role and future of religiously affiliated law schools. Religiously affiliated schools and their faculties have made important contributions to legal education over many years.¹ My participation in the symposium is certainly not in any way antagonistic to religiously affiliated schools. Indeed, legal education should honor the special role such schools have played and can continue to play in the legal profession.

President Lee and Professor Destro have presented important papers that remind us of the place of religiously affiliated law schools, and, more importantly, the major roles such schools play in enriching the teaching and scholarship of legal education. Such schools have a number of opportunities that other law schools, particularly publicly supported law schools, do not have. President Lee and Professor Destro suggest, however, that despite the significant successes of religiously affiliated law schools, many of these schools are not fulfilling their missions as fully as they should. They present a good case for these propositions. Put simply, my conclusion is that the accreditation rules and regulations of the Association of American Law Schools (AALS) and the American Bar Association (ABA) probably are not the primary cause of the problems, or even a major contributor to the problems.

In this commentary I will note some general principles regarding the accreditation process of law schools, respond to a few specific points that Professor Destro makes, note the important accommodations that have been made to promote both sound law school accreditation and the missions of religiously affiliated law schools, and conclude that accreditation rules probably do not interfere significantly with the central mission of these schools.

In considering law school accreditation, it is important to draw a distinction between the accreditation membership requirements of the

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1. See, e.g., Steven M. Barkan, *Jesuit Legal Education: Focusing on the Vision*, 74 MARQ. L. REV. 99 (1990); Rex E. Lee, *The Role of the Religious Law School*, 30 VILL. L. REV. 1175 (1985); Martha Vazquez, *Notre Dame Law School: Catholicism, Conscience and Commitment*, 69 NOTRE DAME L. REV. 1005 (1994).

AALS and the standards of the ABA. It is easy to confuse the two because the organizations often conduct joint site visits, and in many areas their accreditation expectations are similar.² Yet, conceptually, there are important differences. The ABA accreditation process is often acting as an assurance of quality for external entities. Notably, all state supreme courts use ABA approval as an assurance that students have met the educational requirement for licensure. The existence of an educational requirement for licensure means that there must be some definition of what meets that educational requirement and what does not. Otherwise, diploma mills conferring degrees without genuine education would be sufficient to meet the licensure educational requirement. Accreditation performs the task of assuring that these minimum educational program requirements are met. This inevitably means that there are some limits on what some schools would do if accreditation did not exist. Drawing the proper balance between minimum acceptable standards and the autonomy of institutions must be an ongoing concern of all effective accreditation agencies. The United States Department of Education also relies on ABA accreditation for eligibility for certain federal programs, including some student loan programs.

The AALS, on the other hand, is a membership organization. Its accreditation process is generally not relied on by state supreme courts, the U.S. Department of Education, or other similar bodies. Rather, it is an organization of schools dedicated to maintaining and enhancing the quality of legal education and promoting certain goals and values. This leads the AALS to put more emphasis on faculty scholarly productivity, collegial governance, and diversity.³ The AALS, as a membership organization, has more freedom to pursue the consensus values of its members without specific reference or obligation to external organizations.

Identifying all the purposes of accreditation and the roles that accreditation plays is a complex matter beyond a full discussion in this commentary.⁴ The legitimate purposes of accreditation vary from organization to organization. For example, a primary purpose of ABA accreditation is ultimately to protect the public in terms of the educational

2. Joint site visits occur only for those schools accredited by both the ABA and the AALS. Some ABA schools are not AALS members, and in that case, the AALS plays no role in the site visit process. It should also be noted that once the site visit is concluded, the consideration of the school's accreditation by the two organizations is independent.

3. ASSOCIATION OF AMERICAN LAW SCHOOLS, 1994 HANDBOOK, Bylaws, §§ 6-1, 6-5, 6-8 (1994).

4. For a review of the functions of accreditation, see Steven R. Smith, *Accreditation Revisited: ABA Reexamination of Approved Law Schools*, 27 WAYNE L. REV 95, 96-108 (1980).

qualifications of the students who graduate from law school. The primary purpose of the AALS, in a way, focuses more directly on the interests of legal education itself.

Professor Destro's provocative paper raises many interesting issues. I will consider three of his points: (1) his discussion of diversity, (2) what may be a misunderstanding of academic freedom in accreditation, and (3) the call for "self study" of the accreditation process.

Professor Destro correctly notes that the meaning of "diversity" is sometimes blurred or uncertain in legal education. There are many kinds of diversity. Like the term "extraordinary treatment" in the health law area, we may once have had a clear understanding of what "diversity" means, but it has been applied in so many different ways that the meaning has become clouded. Diversity *within* a law school is important, but diversity *among* law schools as institutions is also desirable. Ironically, of course, by insisting on some level of diversity within each law school, we reduced somewhat the diversity among law schools. (The perfectly homogeneous law school could not exist.) The accreditation rules do limit some diversity among law schools; by definition all forms of self-regulation limit diversity.

Within the current rules, however, there is considerable latitude for experimentation and diversity, and, in fact, there is significant diversity among accredited American law schools. It is also worthwhile to note that while diversity is generally a positive value, there are some kinds of diversity we do not seek. For example, legal education is not worse off because there are no law schools that refuse to admit members of minority groups. Professor Destro's suggestion that we clarify or specify the kinds of diversity we seek could help reduce the level of misunderstanding that sometimes occurs in our discussion of diversity.

Professor Destro correctly notes the value of religious diversity within a law school. The benefits of such diversity are undoubtedly among the reasons that both the ABA and the AALS have adopted accreditation rules that prohibit law schools from discriminating on the basis of religion. The absence of religious discrimination will presumably increase religious diversity in most law schools. Professor Destro also notes that the accreditation rules contain no religious "affirmative action" requirement to ensure such diversity. Several reasons for this come to mind, including the necessary intrusion into the private religious lives of students and faculty that such a religious affirmative action requirement would imply. (Similar problems would arise with a sexual orientation affirmative action requirement.)

Some misunderstanding or misinformation exists about the role of the ABA or the AALS in protecting academic freedom. For example, Professor Destro's article states that the ABA has implied "that anyone who believes that abortion is 'tantamount to murder' is unqualified to teach *Roe v. Wade* without close supervision by accrediting agencies, deans, faculty committees, and perhaps the ABA itself."⁵ That misreads the policies of both the ABA and the AALS regarding academic freedom and is inconsistent with what actually happens in the country. In fact, there are faculty members who teach in a number of law schools, including religiously affiliated law schools, who believe that abortion is tantamount to murder. Indeed, a faculty member with such a view teaches constitutional law in my school without extraordinary oversight by accrediting agencies, deans, or faculty committees. The suggestion that someone who disagrees on religious or philosophical grounds with *Roe v. Wade* should be precluded by accrediting agencies from teaching constitutional law without close supervision by those agencies or the faculty is inconsistent with both the ABA and AALS's commitment to academic freedom.

Suppose, instead, a law school said, "If any faculty member concludes that the Constitution protects the right of privacy, including the right to choose an abortion, that faculty member's employment will be terminated. Even if the faculty member personally finds abortion abhorrent, he or she will be fired." In this case, a legitimate issue of academic freedom would be raised which should come to the attention of accrediting agencies, and the ABA and AALS might well take action to protect academic freedom. This scenario is substantially different from the "*Roe v. Wade* professor" hypothetical that Professor Destro suggested.

A central theme of Professor Destro's paper is that a serious self-study of the accreditation process should occur. The self-study he suggested would review the purposes, goals, standards, and procedures of accreditation. Such a self-study would, of course, also include consideration of the appropriate relationship between religiously affiliated schools and accreditation, and whether religiously affiliated law schools have appropriate latitude to fulfill their missions. In recent times, the ABA and AALS have engaged in very substantial self-study concerning the accreditation of law schools. The healthy discussion Professor Destro calls for occurs frequently within the ABA and AALS and even has increased.

5. Robert A. Destro, *ABA And AALS Accreditation: What's 'Religious Diversity' Got to Do With It?*, 78 MARQ L. REV. ____ (1995).

The enormous level of self-study of the accreditation process conducted by the AALS during the last ten or fifteen years includes: AALS President Roger Crampton's discussion of whether the AALS ought to be in the accreditation process; the "McCarthy Report" dealing with the AALS membership requirements and process; an ongoing review of the AALS Bylaws and Executive Committee Regulations and a number of changes adopted in those requirements; a special "working group" to consider issues raised by schools about Bylaws and Executive Committee Regulations involving sexual orientation; and a retreat involving both the Executive and Accreditation Committee to consider the accreditation process. Similar examples can be given involving the ABA review of accreditation. These include: the "Ramsey Commission" and the more recent "Wahl Commission," dealing with the entire ABA accreditation process; a validity and reliability study supervised by an accreditation expert outside legal education; a thorough review of every Standard and Interpretation undertaken by the Standards Review Committee of the ABA; extensive hearings and comments on a variety of proposed new Standards including the nondiscrimination Standards; an additional process (required by changes in U.S. Department of Education regulations) undertaken by the Section of Legal Education to study the validity and reliability of every Standard and every Interpretation of the ABA. Although some of these efforts have been limited or uncoordinated, other efforts have included a thorough review of the accreditation process and they demonstrate that the dialogue for which Professor Destro calls is well underway.

The self-study process should, and undoubtedly will, continue. Professor Destro suggests many very useful questions that this self-examination should address. Past reviews of accreditation have, in fact, involved many of these very questions in one form or another. There is no single, final answer to these insoluble problems, and additional dialogue of the sort Professor Destro suggests would be healthy.

My experience as a member of the ABA Standards Review Committee and chair of the AALS Accreditation Committee is that the interests of religiously affiliated law schools play an important role in the discussion of accreditation standards and requirements. Indeed, where the interests of religiously affiliated law schools might be uniquely affected by changes in accreditation rules, such as those dealing with sexual orientation, a considerable dialogue is undertaken with religiously affiliated

schools. Examples of this are the changes in ABA Standard 211⁶ that contain a specific religious exception, and the Report of the Executive Committee Regulation 6.17 Working Group of the AALS that developed a consensus statement regarding a need to balance the interests of religiously affiliated law schools and the efforts of the Association to preclude discrimination based on sexual orientation.⁷

It is, I believe, fair to say that during the last two decades a consensus has emerged that religious diversity occupies a special place within the values addressed by the ABA and the AALS accreditation rules. To a considerable extent the real, as opposed to hypothetical, interests of religiously affiliated law schools have been acknowledged and accommodated. There are, of course, other values that the ABA and the AALS must address, and sometimes there is a tension between these values and the mission of some religiously affiliated law schools. There have been, however, substantial good faith efforts to accommodate both these values and the interests of religiously affiliated schools. This effort to find the proper accommodation is ongoing throughout the accreditation process.

Both the ABA standards and the AALS membership requirements include specific provisions intended to recognize this special place of religion in the accreditation values. ABA Standard 211, for example, is intended to protect fundamental religious values.⁸ AALS Executive

6. AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 211, Interpretation 1 of Standard 211(e) (1994) [hereinafter ABA STANDARDS].

7. ASSOCIATION OF AMERICAN LAW SCHOOLS, FINAL REPORT OF THE EXECUTIVE COMMITTEE REGULATION 6.17 (1993) (Working Group).

8. Standard 211(e) provides:

This Standard does not prevent a law school from having a religious affiliation or purpose and adopting and applying policies of admission of students and employment of faculty and staff that directly relate to this affiliation or purpose so long as (1) notice of these policies has been given to applicants, students, faculty and staff before their affiliation with the law school, and (2) the religious affiliation, purpose or policies do not contravene any other Standard, including Standard 405(d) concerning academic freedom. These policies may provide a preference for persons adhering to the religious affiliation or purpose of the law school, but shall not be applied to use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, sex or sexual orientation. This Standard permits religious policies as to admission, retention and employment only to the extent that they are protected by the United States Constitution. It shall be administered as if the First Amendment of the United States Constitution governs its application.

ABA STANDARDS, *supra* note 6, Standard 211.

The Interpretation of Standard 211(e) provides:

Committee Regulation 6.17 provides mechanisms for schools with religious affiliations to adopt preferential admissions and employment practices.⁹

Professor Destro asks why religiously affiliated schools require "special scrutiny." The special scrutiny is really a "special exception" written into the nondiscrimination rules for religiously affiliated schools. In large part to promote the benefits of religious diversity within schools that Professor Destro describes, the accreditation rules prohibit discrimination based on religion. If these rules were applied without exception to religiously affiliated law schools, they would preclude some schools from pursuing their religious missions. Due to the high value placed on religious freedom, the accreditation rules were changed to allow a religious school exception to the general nondiscrimination rules.

The exception for religiously affiliated schools is not absolute. It is qualified because there are other values that the AALS and the ABA also seek to protect. Determining whether a religiously affiliated school is within the qualifications may appear to be special scrutiny. Since the exception to the nondiscrimination rules applies only to religiously affiliated schools, they are the only schools scrutinized to determine if they are operating under the qualifications to the exception.

Differences of opinion exist about whether the present accreditation provisions go far enough, or go too far, in protecting the interests of

As long as a school complies with the requirements of Standard 211(e), the prohibition based on sexual orientation does not require a religiously affiliated school to act inconsistently with the essential elements of its religious values and beliefs. For example, it does not require a school to recognize or fund organizations whose purposes or objectives with respect to sexual orientation conflict with the essential elements of the religious values and beliefs held by the school. August, 1994.

Id. at Interpretation 1 of Standard 211(e).

9. ASSOCIATION OF AMERICAN LAW SCHOOLS, *supra* note 3, Bylaw § 6-4. Executive Committee Regulation 6.17 provides:

It is not inconsistent with Bylaw Section 6-4(a) for a law school with a religious affiliation or purpose to adopt preferential admissions and employment practices that directly relate to the school's religious affiliation or purpose so long as (1) notice of the practices is provided to members of the law school community (students, faculty and staff) before their affiliation with the school; (2) the practices do not interfere with the school's provision of satisfactory legal education as provided for in these bylaws and regulations, whether because of lack of a sufficient intellectual diversity or for any other reason; (3) the practices are in compliance with Executive Committee Regulation Chapter 6.16, as well as all other Bylaws and Executive Committee Regulations; (4) the practices do not discriminate on the ground of race, color, national origin, sex, age, handicap or disability, or sexual orientation; and (5) the practices contain neither a blanket exclusion nor a limitation on the number of persons admitted or employed on religious grounds.

religiously affiliated schools. Few people think the provisions are perfect, but there probably is something approaching a consensus that this is a fair balance. More important, there is an openness to continue to consider the special accreditation problems posed for religiously affiliated schools as those problems arise.

If, as some attending this conference suggest, religiously affiliated law schools are neither fulfilling their missions nor contributing all they might to the intellectual life of the law, then the cause of those lost opportunities is not likely to be found in the accreditation rules. Indeed, focusing on accreditation in this context is a little like worrying about whether the piccolo player was out of tune on the *Titanic*.

Accreditation rules are not major obstacles to most religiously affiliated schools carrying out their missions related to their religious affiliations. This is particularly true of the ABA Standards. I am speaking here of real, not hypothetical, programs that a law school would actually carry out in pursuit of its religious mission if it were not for the accreditation rules. It is possible to imagine a hypothetical law school that might be precluded from fulfilling a religious mission based on some hypothetical religious belief. In the real world, however, the ABA Standards do not seriously prevent religiously affiliated law schools from carrying out their special missions. The question is: What specifically would a law school actually do that would be necessary in fulfilling its religious mission that it is not doing now because accreditation rules prevent it from doing so?

We in legal education sometimes displace blame from ourselves to external forces, such as accreditation, when we are not as successful as we would like to be in fulfilling our missions. Even if accreditation is partly responsible for limiting what some schools would really do in fulfilling religious missions, I believe it is likely that such impact is dwarfed by other factors that influence what goes on in law schools. There is, for example, fairly limited excellent legal scholarship with a religious basis. There are, of course, scholars and teachers who have made enormous contributions to our understanding of law and religion. Professor, and former Dean, Thomas Shaffer is an especially strong example. There are, unfortunately, too few such faculty at our religiously affiliated law schools. Few religiously affiliated law schools have in recent years promoted excellence in teaching courses from a biblical or religious perspective. There is little literature on the pedagogy of teaching from a religious perspective, and very few casebooks or sets of good materials for such courses.

The absence of a substantial body of course materials, scholarly research, and courses in law schools from a religious perspective is not due to accreditation. In large measure, it is because schools, for a variety of reasons, have not encouraged faculty and students to engage in such activities. Yet, these scholarly efforts go to the very core of the academic enterprise. They are much more fundamental to what we do than what goes on in the placement office.

Rather than focusing on accreditation as limiting the many contributions that religiously affiliated schools can make in fulfilling their missions, focusing on what *can* be done, consistent with strong academic values and governance, is more likely to be productive. The significant contributions that religiously affiliated law schools can make to our society and our profession are much too important to be lost by diversions to matters like accreditation that have little practical effect on whether religiously affiliated law schools are able to meet their missions.

