

UNM School of Law
Faculty Meeting
November 3, 1980
Conference Room
4:00 p.m.

MINUTES

Present: Anderson, Browde, Desiderio, DuMars, Ellis, Flickinger, Goldberg, Gonzales, Hart, Kovnat, MacPherson, Martinez, Minzner, Muir, Norwood, Occhialino, Parnall, Romero, Scales, Simson, Stelzner, Winograd; Student Representatives Cline, McBride, Gover; Camp

The meeting was called to order by Dean Desiderio, who announced that a special meeting has been called for November 22, 1980, to consider the proposed Promotion, Tenure and Reappointment policies.

The faculty considered the letter from Kay Danforth requesting readmission. Motions to allow her return as a first-year student carried.

The main agenda item was the AALS's proposed Regulation Governing the Use of Religious Factors in Law School Decision-Making, a memorandum from John A. Bauman dated October 17, 1980. Hart moved that our law faculty indicate immediately its concern regarding the ramifications of the proposal and the necessity of allowing more time for discussion and formation of a response, in light of the November 14 deadline. Motion carried. *See Bauman's letter of 11/17/80. Committee decided against promulgation. Bylaw 6-e remains.*

Goldberg invited faculty members to observe the final practice arguments of our moot court team on Wednesday, 8:30 p.m., at the law school, as well as the regional competition to be held at the Federal Building on Friday and Saturday, November 7 and 8.

Meeting adjourned.

Respectfully submitted,
Louise R. Camp
Louise R. Camp
Sec'y

November 4, 1980

Mr. John A. Bauman
Executive Director
Association of American Law Schools
Suite 370, One Dupont Circle, N.W.
Washington, D.C. 20036

Dear John:

At a recent meeting, our faculty discussed the proposed "Executive Committee Regulation Governing the Use of Religious Factors in Law School Decision Making." The faculty expressed considerable concern about the policy. However, the faculty was not of one voice. Some believe that the policy is not strong enough; that is, that it allows the establishment of religion by member schools. This would work as a barrier to entry in the legal profession. On the other hand, others are of the opinion that the policy infringes on the freedom of certain people to associate and choose the religion of their choice. As you might guess, many of the faculty expressed views that may be considered the "middle ground." It should be noted that at least one faculty member indicated that the regulation left many questions unanswered and should not be adopted as written. For example, the policy contains nothing about restrictions on publications or the status of a faculty member who, after entering the law school as a member of a particular religion, changes his or her belief.

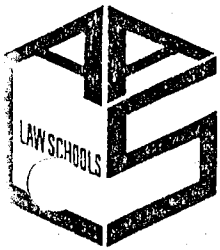
The faculty as a whole believed that it needs more time to discuss the regulation and to formulate a statement for the association. It would be safe for me to state that the faculty feels that it would be a mistake to adopt this regulation without further deliberation.

We hope to discuss the regulation again within the next two weeks and then submit a statement. We realize that under the present schedule, we cannot make the November 14 meeting.

Sincerely,

Robert J. Desiderio
Dean

RJD/jg



ASSOCIATION OF AMERICAN LAW SCHOOLS

Suite 370, One Dupont Circle, N.W.

Washington, D.C. 20036

202/296-8851

ACTION REQUESTED

October 17, 1980

MEMORANDUM 80-50

To: Deans of Member Schools and
Members of the House of Representatives

From: John A. Bauman

Subject: Proposed Executive Committee Regulation Governing the
Use of Religious Factors in Law School Decision Making

The Association of American Law Schools currently includes in its membership a number of schools that are church sponsored or religiously oriented and has applications for membership from other like schools. Requirements for membership in the Association presently include Bylaw §6-4 which mandates a school to maintain equality of opportunity in legal education "without discrimination or segregation on the ground of race, color, religion, national origin, or sex."

During the past few years, questions have been raised as to whether and under what circumstances the use of religious factors by church related law schools constitutes discriminatory conduct proscribed by Bylaw 6-4. In seeking to resolve this issue, the Executive Committee has drafted a proposed regulation for your consideration. The background and explanation for its provisions are set out below. An appendix is attached setting forth the legislative history of the proposed Executive Regulation. It demonstrates the unusual difficulties posed by this matter and the extraordinary attention that was given to it.

The procedure followed by the Executive Committee in considering the adoption of this regulation does not follow the usual pattern. Ordinarily the Executive Committee promulgates a regulation and the burden is then on the membership to file objections within sixty days. Because of the sensitivity of this general question and the difficulty of some of the subsidiary issues, the Executive Committee has decided to circulate a draft of the proposed regulation requesting comment of member schools before formally adopting it.

History of Bylaw 6-4

The original policy of the Association against discrimination was aimed expressly against racial barriers in the admission of

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students to law schools. Adopted in 1950 as §6-1, the Bylaw declared as an Association objective: "Equality of opportunity in legal education without discrimination or segregation on the ground of race, or color." A sanction was added in 1957, and as so amended, the Bylaw remained unchanged until 1970.

In 1969 a Special Committee on Women in Legal Education recommended to the Executive Committee that the word "sex" be added to the Bylaw. The Executive Committee approved the recommendation and decided to add the words "religion and national origin." In submitting the proposed revision of the bylaw to the member schools for adoption, the Executive Committee explained its decision to make this addition by noting that this was "standard language used in various federal statutes" and that "there would be no harm in a prohibition against discrimination on ground of religion in law schools." There is no indication that the Committee was aware of the Title VII exemption of religious institutions. The proposed bylaw was adopted without any discussion by representatives of the member schools of the inclusion of the word "religion", the debate focusing exclusively on sex discrimination in employment.

The Proposed Executive Committee Regulation

The Executive Committee is firmly committed to the antidiscrimination standard of Bylaw 6-4 which is believed to represent a sound policy both morally and legally. There remains, however, the question of what action by the schools constitutes discrimination in violation of the Bylaw. Clearly, Section 6-4 does not totally bar consideration of the various categories listed therein. Certain uses of race and ethnic background have been thought not to violate the standard and indeed the Association has argued in both the De Funis and Bakke cases that race may be considered without violating the Equal Protection clause of the U.S. Constitution. Thus it would seem quite clear that at least some uses of religious considerations are also permissible under Bylaw 6-4. It is pertinent to note in this regard that schools with a religious orientation also have a right to pursue their educational objectives. There is, in short, a constitutional right of the institutions to freedom of religion. It could be argued that as a voluntary organization, the Association is under no legal compulsion to respect that constitutional right. Regardless of whether or not this is a constitutionally valid position, it seems unlikely that member schools would want to adopt a rule that, if enforced by the government, would violate basic freedoms of religion and speech.

The issue thus presented to the Executive Committee is how to interpret Bylaw 6-4 as it applies to the use of religious considerations in the law school decisional process by church sponsored or religiously oriented law schools. State supported schools are, of course, constitutionally prohibited from pursuing religious objectives. The appropriate device for interpreting and implementing the Bylaws is an Executive Regulation (Bylaw 5-4). The regulation proposed by the Executive Committee below is an attempt to set out when the antidiscrimination standard of Bylaw 6-4 is not violated by a consideration of religious factors. The regulation does not change the basic antidiscrimination policy of the Association.

The text of the proposed regulation is:

"7.3 A member school that is church sponsored, affiliated with a religious institution or committed to advance the tenets of a particular religion or set of sectarian beliefs may adopt lawful policies consistent with its religious or sectarian beliefs or objectives, if:"

- (a) the school fully discloses its policies to prospective students, professional staff, and faculty members prior to their association with the school;
- (b) the policies as formulated and administered do not inhibit students and faculty members in the selection of areas of research, publication of the results of their research, expression of any view in class discussion, and expression of views pursuant to their individual beliefs, in free association with other individuals and groups in private and public discussions;
- (c) the school affirmatively seeks to achieve a student body and faculty of diverse backgrounds and views including a significant number of students and faculty who are not members of its religious group;
- (d) the policies as formulated and administered do not regulate the private behavior of students, professional staff or faculty members; and
- (e) the policies as promulgated and administered do not invidiously discriminate against any person on the basis of race, color, religion, national origin or sex."

The adoption of this regulation means that a religiously sponsored or oriented law school can take into account religious considerations in such matters as admissions, fee differentials, and the employment of staff and faculty so long as the five conditions set forth in the regulation are met.

The first condition is a notice or disclosure requirement. If a school wishes to take into account religious factors in making law school decisions, it is essential that notice of that fact be given to prospective students and faculty. Persons who enter into a relationship with such institutions after a full disclosure have a much less plausible basis for complaint when religious considerations are in fact taken into account.

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The second condition goes to the heart of the educational enterprise. The academic freedom of faculty and students is essential to quality legal education and the quality of the educational program is the principal concern of the Association. Requiring compliance with this condition means that a school may not use religious factors to prohibit or inhibit research and the free exchange of individual ideas and beliefs.

The third condition places an affirmative burden on the school to recruit actively students and faculty with divergent views from those of the sponsoring religious group. Insularity must be avoided since the educational experience is enhanced by the exposure to diverse views and opinions.

The fourth clause, subsection (d), is intended to protect the rights of privacy of faculty, professional staff and students. That protection extends to those rights of privacy shielded from governmental interference by the constitution. Thus this subsection prevents a school from enforcing with secular sanctions religiously based rules governing private conduct. A school may not terminate a faculty member, expel a student, or impose a lesser academic sanction for private behavior that is solely in violation of a religious code of conduct. For example, procuring an abortion, drinking alcoholic beverages, or violating the Sabbath may not be the basis for discharge, expulsion or other academic sanction. The religious organization may, of course, impose its own religiously based sanction on the offending party.

The fifth and final clause prohibits a school from invidiously discriminating against any person on the basis of race, color, religion, national origin or sex. However difficult it might be to define precisely "invidious discrimination," the intent of this provision is clear. A church sponsored or religiously oriented school may if it chooses encourage enrollment of students from its own sponsoring institution. It may not, however, exclude persons solely on the basis of a religious preference (e.g., all Catholics) or of a specific race (all Koreans).

The Executive Committee plans to consider the responses of member schools at its meeting to be held on November 14 and 15, 1980. In order to assist the Executive Committee's deliberations, responses to this memorandum should be sent to this office no later than November 10, 1980.

APPENDIX

Legislative History of Proposed Executive Regulation 7-3

November 10, 1978 Executive Committee Meeting.

In considering the application of a church supported law school for membership in the Association of American Law Schools, the Executive Committee determined to establish a special committee to decide under what circumstances a church related law school that takes into account religious considerations in the administration of its program may be admitted to membership and to recommend what changes in the bylaws it considers desirable.

January 3-5 A.A.L.S. Annual Meeting, 1979

President Scoles announced the appointment of a Special Committee on Religious Discrimination composed of John E. Kennedy, Chairman, Southern Methodist University; John A. Bauman, University of California at Los Angeles; and Robert J. Levy, University of Minnesota.

April 28, 1979 Meeting of the Special Committee.

The Special Committee met at the Association offices on Saturday, April 28, 1979. After extensive discussion, the Committee agreed that an exempting amendment to the bylaw should be kept general and that the Executive Committee through subsequent regulations or statements of policy in case by case decision should develop the following principles:

1. That any restatement should protect the free exercise of religion by students, faculty, and staff.
2. Religious consideration should be limited to those practices that are necessary to the accomplishment of the school's religious objectives.
3. The rule should be administered to examine the extent to which the school has tried to diversify its student body and faculty consistent with the school's religious mission.
4. Academic freedom of the student body and faculty should be protected.
5. Membership in the church or adherence to certain religious belief should be used by the law school only as a qualifying factor for consideration for appointment of the faculty and should not be viewed as an affirmative demonstration of academic competence and qualification for appointment.
6. The school should be expected to have a full-time faculty with a diverse educational background and professional experience.
7. Students once admitted should be treated without discrimination and should be treated equally.

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Three proposed amendments were drafted for consideration by the Executive Committee.

1. The Kennedy draft:

"But a member school that is affiliated with a religious institution may apply policies based on religion if the school discloses fully and fairly these policies and demonstrates that these policies do not impair the quality of its legal education as required by these bylaws."

As an alternative the last clause was rephrased.

"Its ability to present a sound program of legal education as required by these bylaws."

2. The Levy draft:

"Provided that a law school may apply to the Association for an exemption from the provisions of this bylaw that refers to religion, if the law school is affiliated with a religious institution or committed to advance the tenets of a particular religion or set of sectarian beliefs. The application shall set forth the law school's affiliation and the ways in which the affiliation or sectarian beliefs affect the school's policies on admission, financial aid, faculty appointments and employment, program of instruction, and student, faculty and employee conduct. If the law school satisfies the Executive Committee that the policies in question do not impair the quality of the school's educational program as evaluated under these bylaws the Executive Committee shall grant the exemption."

3. The Ruud draft:

"A member school that has substantial institutional religious affiliation may take into account the religious affiliation or commitment of an applicant for a faculty or professional staff position or for admission in making the appointment or granting the admission to its degree program and may establish codes of faculty and student public behavior that serve the religion's purposes. A school that so takes into account religious affiliation or commitment shall publish its policies with respect thereto, treat its faculty and students equally for all educational purposes, assure the religious freedom of those not members of the church and present a sound program of legal education as defined by the bylaws and Executive Committee regulations."

June 1, 1979 Executive Committee Meeting.

The Executive Committee considered the report of the Special Committee on Religious Discrimination. Professor Bauman, the Chairman of the Accreditation Committee and a member of the Special Committee on Religious Discrimination, reviewed the Special Committee's discussion. He reported that the AALS Accreditation Committee at its May 15 and 16, 1979 meeting considered the draft amendments to the bylaw and expressed very substantial doubts about the wisdom of an amendment authorizing the use of religious considerations by member schools and did not support any change in the bylaws. However, the Special Committee adhered to the view that some change should be made. Professor Ruud called the Committee's attention to the differences between the Levy draft and the Kennedy and Ruud draft. The Levy draft expressly classifies the use of religious considerations by a member school as religious discrimination and then goes on to permit certain kinds of religious discrimination by a member school. The Levy draft requires a member school to seek exemption and places on it the burden of establishing that the uses to which it puts religious discriminations are benign and do not impair the quality of the school's educational program. The Kennedy and Ruud drafts, on the other hand, classify certain uses of religious consideration by member schools as not constituting religious discrimination under the bylaws. The Kennedy proposal is a more general one. A reasonable classification that is germane to appropriate purposes may be viewed as not involving discrimination. Member schools would probably prefer to have their use of religious considerations classified as not violating the injunction against religious discrimination rather than having it categorized as a permissible form of religious discrimination.

Professor Ruud stated that if the Executive Committee were to decide that it wished to deal with this question by means of an Executive Committee Regulation instead of an amendment to the bylaws, it would need to formulate the Executive Committee Regulation in terms of the permissible use of religious considerations that do not constitute religious discrimination. Under Bylaw §5-4 the Executive Committee is authorized to interpret and implement the bylaws by issuing regulations. The Executive Committee, on the other hand, has no authority to amend the bylaws by making an exception to the prohibition against religious discrimination. Dean Cribbet stated that the Committee's discussion had made it clear to him that it will be very difficult to draft any interpretation or rule. Because of this he suggested that the Special Committee be asked to draft an Executive Committee regulation and not a bylaw amendment. Since it is likely that the initial formulation will need to be revised in light of experience, an Executive Committee regulation is a more appropriate instrument than the bylaw amendment. On motion by Professor Edwards, seconded by Professor Vernon, the Executive Committee requested the Special Committee to prepare for its consideration an Executive Committee regulation that would recognize that a member school consistent with religious and academic freedom could under limited circumstances take religious considerations into account in making certain educational decisions, that the draft regulation recognized that these permitted actions do not constitute religious discrimination, and that the regulation expressly prohibit invidious effects of any use of religious considerations or factors.

June 23, 1979 Meeting of the Special Committee.

In response to the request of the Executive Committee, the Special Committee met to draft an Executive Committee Regulation. The Committee first restated certain basic general principles that should be applied in interpreting any formulation of the proposed regulations.

Statement of General Principles.

1. The law school should protect the free exercise of religion by students, faculty and staff.
2. The law school should limit religious considerations to those practices that are necessary to the accomplishment of the school's religious objectives.
3. The law school should try to diversify its student body and faculty consistent with the school's religious mission.
4. The law school should protect the academic freedom of the student body and faculty.
5. The law school should have a full-time faculty with a diverse educational background and professional experience.
6. The law school should treat students once admitted equally and without discrimination

Two versions of the regulation were drafted. The first provides an exhaustive list of the circumstances under which the school may use religious considerations in making certain educational decisions. The concept is that these decisions do not constitute discrimination or segregation on the ground of religion as that phrase is used in Bylaw §6-4. As thus formulated, regulation 7-3 reads:

7-3 Permitted Uses of Religious Considerations.

a) If necessary to accomplish its religious objectives, a member school that has a substantial institutional religious affiliation or is committed to advance the tenets of a particular religion or set of sectarian beliefs may:

- 1) Set tuition for students who adhered to the religion or sectarian tenets of the member school at an amount less than that set for other students if the differential is justified by the amount of funding received by the school from its religious source;
2. Grant financial aid to applicants or students who adhered to the religion or to the sectarian tenets of the member school on a preferential basis if that is required by the terms of the testamentary or other grant of the funds used and if financial aid is also available to students who do not adhere to the religion or sectarian tenets of the member school;

3. Appoint the dean by preferring a candidate who adheres to the religion or sectarian tenets of the member school;
 4. Appoint a member of the faculty by preferring a candidate who adheres to the religion or sectarian tenets of the member school so long as lack of diversity of sectarian belief among members of the faculty does not jeopardize the school's ability to provide a sound educational program;
 5. Admit the students by preferring applicants who adhere to the religion or sectarian tenets of the member school so long as the lack of diversity of sectarian belief among the members of the students body does not jeopardize the school's ability to provide a sound educational program; and.
 6. Require faculty, staff and students to adhere to a code of conduct so long as the code is not applied to private conduct and the code does not impair the religious freedom of persons who do not adhere to the religion or sectarian tenets of the member school.
- b) In taking an action described in subsection (a) religious considerations may not be used to make invidious distinctions among persons not adhering to the religion or sectarian tenets of the member school.
 - c) A member school that adopts policies taking into account religious or sectarian considerations shall publish those policies and inform all interested persons as soon as feasible.

The second version of the proposed regulation is a general statement of permitted use of religious discrimination. It reads as follows:

7-3. Permitted Use of Religious Considerations.

If necessary to accomplish its religious objectives, a member school that has a substantial institutional religious affiliation or is committed to advance the tenets of a particular religion or set of sectarian beliefs may adopt policies based on religion if the school fully discloses these policies and demonstrates that these policies do not invidiously discriminate against any person because of that person's religion and do not impair the quality of its program of legal education as is required by the bylaws and Executive Committee regulations.

August 12, 1979 Minutes of the Executive Committee Meeting

The Executive Committee had before it the report of the Special Committee on Religious Discrimination dated July 31, 1979. Chancellor Cribbet reminded the Executive Committee that at its meeting on June 1 and 2, 1979, it

had rejected the idea of a bylaw amendment and had asked the Special Committee to develop for its consideration an Executive Committee regulation. As an Executive Committee regulation cannot modify the requirements of a bylaw, the Executive Committee regulation would identify through statement of principle or through more specific rules those uses of religious considerations by member schools that do and do not constitute religious discrimination prescribed by Bylaw §6-4 (a). After an extensive discussion of the Special Committee report the Executive Committee determined to accept the report of the Special Committee on Religious Discrimination, to express to the Special Committee its appreciation for a thoughtful and thorough analysis of a difficult question and to propose no amendment to the bylaws and to promulgate no Executive Committee regulation on the subject of use of religious considerations by member schools in making educational decisions.

Novemebr 16-18, 1979 Executive Committee Meeting.

The Executive Committee asked Chancellor Cribbet to establish a sub-committee of the Executive Committee to draft a bylaw amendment of §6-4 (a) that would recognize the kinds of religious considerations a member school could take into account. Professor David H. Vernon assumed the responsibility of preparing such a statement.

November 27, 1979.

The first and tentative draft of David H. Vernon was transmitted to the Executive Committee. That statement read as follows:

Proposed Policy. If necessary to accomplish its religious objectives a member school that has a substantial institutional religious affiliation or is committed to advancing the tenets of a particular religion, may adopt policies designed to advance such religious beliefs if:

- 1. The policies do not discriminate invidiously against any person because of that person's religion;*
- 2. The school fully discloses such policies to prospective students and faculty members prior to their association with the school; and*
- 3. The policies as formulated and administered do not inhibit students and faculty members in their selection of areas of research or in expressing their views freely in class in the publication of the results of their research or in their law reform efforts.*

The memorandum stated that the draft regulation is based on the notion that the quality of the educational program at an applicant school is the dominant issue and perhaps the only issue when membership is considered and that the quality of the educational program is adversely affected if the religious goals sought by the school inhibit the free expression of ideas, a) in the classroom, b) in publication of the results of research by students or faculty members, or c) in the law reform efforts of students or

faculty members. The free expression of ideas also requires that students and faculty members be free to determine the areas they wish to investigate.

In response to that memorandum Jerre Williams suggested that the third condition be amended to read:

"The policies as formulated and administered do not inhibit students and faculty members in their selection of areas of research or in expressing their views freely in class and the publication of their research or in their serious and dignified efforts espousing current legal policy or changes in the law. In publication of research and the espousal of causes, the school has the right to insist that the views advanced be disassociated from any possible inference of approval by the school."

January 3-6, 1980 Meeting of the Executive Committee.

Professor Vernon's draft of an Executive Committee regulation authorizing uses of religious consideration by member schools was considered by the Executive Committee. After extensive discussion, Chancellor Cribbet suggested that the Executive Committee not seek to adopt a specific version of an Executive Committee regulation but instead ask Professor Vernon to revise his proposal in the light of the discussion. By consensus the Executive Committee adopted that view.

January 29, 1980. Memorandum by David H. Vernon Entitled "Discussion of Policies Relating to Schools Seeking to Forward Religious Goals."

The memorandum stated that the one dominant issue in this area is the quality of the program of legal education offered by the applicant school. Thus Professor Vernon proposed that the Executive Committee attempt to define those areas in which efforts to forward religious or philosophical goals are most likely to impinge on the quality of the school's program of legal education and that these various practices be tested against that definition. The memorandum set out various uses of religious considerations by law schools and discusses whether or not the quality of legal education is affected thereby.

January 30-31, 1980 Executive Committee Meeting.

The Vernon memorandum of January 29th was considered by the Executive Committee. After a very extensive discussion, it was the consensus that the Staff of the National Office should prepare a new draft of the regulation taking into account the discussion at this meeting and that this proposal should be placed on the agenda of the Executive Committee meeting in May, 1980.

May 21, 1980 Executive Committee Meeting.

A proposed Executive Committee regulation concerning religious discrimination was submitted to the Executive Committee by Associate Director R. Paul Richard. The proposed regulation read as follows:

"A member school may adopt policies designed to advance religious beliefs or objectives if:

- a) *The school fully discloses its policies to prospective students and professional staff and faculty members prior to their association with the school and these policies as formulated and administered encourage the development of a student body and faculty of diverse background and views;*
- b) *The policies as formulated and administered do not inhibit students and faculty members in selection of areas of research, publication of the results of their research, expression of any view in class discussion, and expression of views pursuant to their individual beliefs and free association with other individuals and groups in private and public discussions,*
- c) *The school maintains a diverse student body and faculty including a significant number of students and faculty who are not members of its religious group; and*
- d) *The policies as formulated and administered do not invidiously discriminate against any person on the basis of race, color, religion, national origin or sex."*

May 29-30, 1980 Executive Committee Meeting.

The Richard's amendment was considered by the Executive Committee at its meeting on May 29th. After an extensive discussion of the issue, motion was made that the Executive Committee regulation as set forth in the Richard memorandum as amended during the discussion be submitted to the member schools for comment with notice to them that the Executive Committee intended to adopt this regulation or a similar one reflecting the comments received.

June 16, 1980

By memorandum to the Executive Committee Jerre Williams asked that the matter be placed back on the agenda for the August meeting and that the proposed regulation not be circulated to the membership.

August 3, 1980 Executive Committee Meeting.

The Executive Committee again considered the regulation and after prolonged discussion approved the regulation set out in the covering memorandum and asked that it be circulated to the membership for comment.