School of Law
Faculty Meeting
November 17, 1980
Conference Room
4:00 p.m.

MINUTES

Present: Adamson, Anderson, Browde, Desiderio, DuMars, Flickinger, Goldberg, Gonzales, Hart, Kovnat, Muir, Norwood, Occhialino, Ruiz, Scales, Simson, Winograd; Student Representatives Gover, McBride; Camp

The meeting was called to order by Dean Desiderio; minutes of the meetings on October 20 and November 3 were approved.

The following announcements were made by the Dean:

a) The Law School has received an anonymous gift of $25,000.00 for the law library.

b) We are beginning to receive responses to our appeal to our graduates for funds.

c) The Board of Educational Finance met last Friday to make final budgetary recommendations.

d) Northern Illinois University and St. John's University at Jamaica, N.Y. are looking for deans; University of Denver is seeking a director of their Graduate Tax Plan; and University of Dayton needs UCC instructors.

The remainder of the meeting centered on discussion of the AALS proposal regarding religious factors in accredited law schools. Word from John Bauman is that there is still time for our faculty to pursue the subject and for us to present a statement. It is clear that a majority is in favor of a rule which limits the role of religious factors in legal education.

Dean Desiderio expressed congratulations of the entire law school to our Moot Court team for their performance in the recent competition.

Meeting adjourned.

Respectfully submitted,

Louise R. Camp

Louise R. Camp
Sec'y

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OFFICE OF THE DEAN

TEL. (505) 277-4700

November 19, 1980

Mr. John Bauman
Executive Director
Association of American
Law Schools
One DuPont Circle, NW, Suite 370
Washington, DC 20036

Dear John:

Our faculty has met and discussed the proposed regulation governing the use of religious factors in law school decision-making. I will attempt to explain the result of that meeting.

There was no consensus or majority opinion among the faculty. One group believed that the proposed regulation should be adopted as written. Those faculty were of the opinion that the regulation presents a workable compromise between the existing regulations and a regulation specifying that religious factors cannot be considered in decision-making. This group was also of the opinion that the proposed regulation provided AALS visiting inspectors with workable standards to judge and guard against abuses.

A second group stressed that the regulation should not be adopted because it does reflect a compromise. Those faculty argued that a regulation or by-law should be adopted which clearly and expressly prohibits employment of any religious test in the admission criteria or hiring, reappointment and tenure practice of an AALS member. They reasoned that employment of such religious tests would result in only people of a common faith and dogma at the law school and therefore the quality of education would be adversely affected. The open exchange of ideas in the classroom, halls and offices would be prevented, and articles and other written materials discussing different and opposing positions would be restricted.

A third group was opposed to the regulations for other reasons. That group expressed several reasons, but the most prominent was that until we understand and articulate the goals and purposes of the AALS, we understand and articulate the goals and purposes of the AALS, are, we cannot pass on the merits of the regulation. For example: Is the AALS an accreditation institution? An institution which merely disseminates information and provides a forum for its members to meet and discuss topics of common interest? An

institution whose goals are to attempt to advance legal education? An institution which does and should take a position on issues of importance? It was felt that the role of the AALS is the core issue; that issue should be discussed before focusing upon the regulation.

A final theme that emerged concerned the propriety of dealing with this matter by executive committee regulation. Some of our faculty are of the opinion that this matter should be resolved by by-law, or that it at least should come to the membership at the annual meeting for open discussion.

I hope this is helpful. If you have any questions, do not hesitate to call.

Sincerely yours,

Bob Desiderio

Robert J. Desiderio
Dean

RJD/dlh

J. Reuben Clark Law School

Brigham Young University

October 31, 1980

Dean Robert J. Desiderio
University of New Mexico School of Law
1117 Stanford Drive, N.E.
Albuquerque, NM 87131

Dear Desi:

Enclosed is a copy of our response to the proposed AALS regulation on church affiliated law schools. Our principal concern is with subsection (d) which, if adopted, would probably preclude our membership in the AALS. The entire University has a code of conduct deriving from the values associated with our sponsoring institution. We could not be, and would not want to be, excepted from those rules. In my opinion, those standards of conduct, on balance, strengthen rather than weaken the law school educational program. While the subsection (d) reference to "private behavior" may be subject to interpretation, it could well be interpreted to preclude our Code of Behavior.

The concerns about diversity that you raised are real and important. We have no objection to subsection (c), however, and we do seek to recruit faculty and students who are not of the faith. The Code of Behavior (which says nothing about a person's beliefs or point of view) does encourage homogeneity in certain respects; but we think we are diverse in most ways that significantly affect the quality of legal education. Whether or not this is true, we have no quarrel with the value of diversity and think it appropriate that the AALS consider diversity as one criterion in judging the quality of legal education.

On the other hand, we do not think it appropriate for any professional association to try to stamp out diversity within the total system by requiring that each law school be a clone of all the others. Diversity among law schools, consistent with quality legal education, ought to be fostered rather than discouraged. The bottom line is simply this: we would like to be judged on the quality of our educational program and also would like the right to be different in ways that are important to us. If those differences are found in fact to reduce educational quality below the AALS standard, then AALS membership ought not to be granted. But we object to a rule that might exclude us, because of our differences, without regard to the quality of our educational product.

So much for the soap box oratory. I only say it because I feel it. It was good talking with you this afternoon. I appreciate your willingness to circulate our draft statement to your faculty. My best to you, Ted, Leo, Peter, and others whom I met during the CLEO program.

Sincerely,

Bob

Robert E. Riggs

Enc.

MEMORANDUM

To: Executive Committee, Association of American Law Schools

From: Rex E. Lee, Dean, Brigham Young University, J. Reuben Clark Law School

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

On October 17, 1980, John Bauman circulated a memorandum asking for views on the proposed Executive Committee Regulation governing the use of religious factors in law school decisions. We submit the following response in two parts: (A) a summary statement of our general reaction to each provision of the proposed regulation, and (b) a more comprehensive statement with respect to subparts (b) and (d).

A. Summary

1. Our views concerning each of the five subparts of the proposed text are:

(a) Disclosure Requirement. We support this provision.

(b) Academic Freedom. Two problems presented by this subpart are discussed in part B 1 of this memorandum.

(c) Affirmative Action. We have no objection to this provision.

(d) Behavior Violating Religious Norms. As presently conceived and defined, this provision forbids religiously affiliated law schools, but not others, from concerning themselves with the "privat behavior of faculty, staff, and students. The notion that such factors are inappropriate for consideration is itself a recent development and, while disregarding those factors may be expected of public institutions, there seems no a priori reason arising

out of the fostering of quality legal education which demands the same standard of private schools. If school regulations do in fact interfere with high quality they should be dealt with in those terms. Application of special standards to a subgroup of law schools on the basis of a religious definition would appear contrary to the very spirit of the proposed regulation itself. Our views are developed more fully in part B 2 of this memorandum.

B. Discussion of Subparts (b) and (d)

1. Subpart (b), Academic Freedom. We have reservations about the possible effects of this provision upon the Association's existing academic freedom and tenure standards in Section 6-1(6) (c) of the Association's Bylaws. If the proposed text is designed to be a more comprehensive statement of the concept of academic freedom, then it should be considered for adoption in lieu of the present provision. If the present provision is satisfactory, then it seems incongruous to apply a different standard to one subset of member schools.

Our second reservation is based on the interpretive language accompanying subpart (b) which states that ". . . compliance with this condition means that a school may not use religious factors to prohibit or inhibit research . . . ." This interpretive language seems unduly hostile to "religious factors" in three respects. First, it seems to assume that "religious factors" are independent from and not credible constituents of ethical, moral, and humanitarian values. Second, it seems to assume that moral considerations may not appropriately be taken into account in determining whether certain kinds of research should have reasonable limits or safeguards

imposed by a host institution. Third, it seems to assume that persons influenced by religious factors would not, under any circumstances, review the justifiability or appropriateness of research. Yet there are certain kinds of research in sensitive domains, such as research involving human subjects, that may be deemed unjustifiable in light of the potential harm to or exploitation of other human beings. Universities and other research organizations routinely establish review committees to pass upon the appropriateness and acceptability of this and a few other sensitive kinds of research. We believe that "religious factors" are not per se irrelevant to such moral questions and that they should not be categorically excluded from consideration by private educational institutions.

If there is danger from improper or unreasonable limitations on research due to the influence of religious values, the danger should be defined and the remedy should be narrowed to treat the specific problem rather than to exclude religious values from consideration.

2. Subpart (d), Behavior Violating Religious Norms. Adoption of subpart (d) would be contrary to the interests of good legal education for three reasons:

a. The interpretation would itself be an instrument of religious discrimination.

b. At a time when one of the principal concerns of legal educators is undue interference with the prerogatives of individual faculties to structure their own programs, the proposed interpretation would take away from the faculties of schools of religious affiliation the right to be different, where the differences have very little if any conceivable adverse impact on the quality

of the educational program.

c. The proposed interpretation is contrary to the interest of legal education and the interest of the Association because it may preclude some law schools from Association membership without regard to the quality of the educational offering.

Each of these considerations will be separately discussed.

a. The proposed prohibition against regulating behavior applies only to church related schools. There is no parallel requirement applicable to schools that have no religious affiliation. The general preference of deans and faculties is to stay out of the private lives of our colleagues. That is certainly my own preference, and in the eight years this school has existed, the private activities of faculty members have never resulted in any sanction, reprimand, or even discussion. Some kinds of private conduct, however, can have an adverse impact on the law school's welfare. This is true of all law schools, not just those with religious affiliation. In the rare circumstance where this might occur, the dean and the faculty should be free to take appropriate measures. Depriving only religiously affiliated schools of such leeway is discriminatory.

Subpart (d) could be read as an attempt to permit the approach that we have taken, and which has worked well for us. It is an approach that distinguishes between what our faculty and students do in public, and what they do in the privacy of their homes. Upon reading the comments, however, we conclude that subpart (d) raises religious freedom issues for two reasons. First, the breadth of its unqualified prohibition against regulating private behavior, plus the reference in the comments to abortion suggest

that it might take away a discretion that we would not be willing to surrender. The line between public and private conduct is not always easy to draw. Under some circumstances procuring an abortion has, from our perspective, greater potential for destructiveness of the moral environment for which we strive. Second, aside from its effect on our own admissibility to Association membership, a religiously sponsored school should have the option to exclude faculty or students who engage in conduct seriously offensive to its beliefs if it chooses to do so, without having to forego membership in the Association. Regardless of what impact the proposed subsection (d) might have on our own application, therefore, we oppose it.

For some people, traditional notions about extra-marital sexual activities and abortion are outmoded and irrelevant. Others believe that the seventh commandment is as relevant today as in Moses' time, and that abortion can involve a moral issue related to life itself. It is simply not a legitimate function of an association of professional schools to decide which of those views is better, nor to require compromise of moral values as a condition for membership in that association.

It may be argued that a law school practices the same kind of religious discrimination if it requires adherence to standards of conduct rooted in religious values as a condition for admission to the law school or membership on its faculty. The two are not the same. If a law teacher chooses not to join a religiously affiliated faculty, or a student declines to enroll because the person is unwilling to conduct himself or herself consistent with the moral environment sought to be achieved, that teacher or student is not foreclosed from any significant opportunity. There

are scores of other law schools where he or she could obtain professional employment or a legal education without such restrictions.

For the school, by contrast, there is no realistic alternative to membership in the Association of American Law Schools. Nominally, it is a membership association, with no technical accreditation function. In fact, however, throughout the law school world and among many who have dealings with law schools there is a universal assumption that law schools fall into three quality echelons: (1) those not accredited by ABA or members of AALS, (2) those accredited by ABA but not members of AALS, and (3) those that are accredited by the ABA and are AALS members. In some respects, standards for AALS membership are higher than for ABA accreditation, and in the case of every law school in this country, except one, the differences between ABA accreditation and AALS membership relate to the quality of the program. Failure to achieve AALS membership literally means second class citizenship in the eyes of many people, including (1) other law schools (some AALS members will not accept transfer credits from a school not a member of AALS), (2) law graduate employers (many federal and state court judges we have found, are quite conscious of the difference between ABA and AALS schools), (3) prospective law students (we are asked by some prospects why we do not belong to AALS; we believe others draw their own conclusions), and (4) professional organizations (the deans of AALS schools become ex-officio members of the American Law Institute; academic membership in the Rocky Mountain Mineral Institute is limited to persons affiliated with AALS schools).

b. One of the larger concerns currently facing legal education is the threat that outside entities, acting under the aegis of accreditation or some other regulatory objective, will limit the prerogatives of individual faculties to identify their legal education goals and carry them out in their own ways.

The concern is not over quality standards. Rather, it is that in many respects views concerning the most effective means of achieving high quality education will differ. Regulatory bodies should limit their requirements to the fundamentals, and leave it to individual faculties to fill in the interstices as best fits their educational objectives, their philosophy, and their personnel strengths. Going beyond the basics and imposing upon law schools requirements that are related only remotely to program quality, or that represent only one of several conflicting views would have at least two unfortunate effects. First, it would shift policy making authority away from those who are closest to the problem. Second, it would make all law schools more alike by diminishing their options to be different.

Ironically, by adoption of the proposed by-law interpretation, the Association of American Law Schools would impose upon some of its members the very kind of restriction which its members generally contend should not be imposed by outsiders.

Subsection (d) strikes at the core of some of the most strongly held values of our faculty and students, and our sponsoring church. The creation of an environment in which these kinds of values would be honored, and students and faculty would be free of pressures inimical to these values was and is one of the purposes for the creation of our law school. The fact that other

people do not share those values, or may even regard them as silly, is completely beside the point. The point is that the values themselves are not hostile in any way to good legal education.

The great irony is that but for these values, two propositions are beyond question: (1) Our law school would be of lesser quality, and (2) we would be members of the Association of American Law Schools. It is somewhat difficult to be objective about the quality of one's faculty, but the uniform observation of everyone who has examined our school -- including visiting professors and law school inspections teams -- has been that we have a superb faculty, particularly remarkable for a new law school. The reason is no secret. Faculty members who would not otherwise have left their positions at other law schools or in practice were willing to do so because of the attraction of teaching in a place where their deeply held religious values would be regarded as not inconsistent with their professional objectives, in an environment where the two would be regarded as not only compatible, but mutually supportive. The same is true of our students.

It is unfortunate that in the debate over our School's admissibility to membership, our most important values and their impact on legal education have been overlooked. I speak of values such as the eternal worth and dignity of the individual, the improvability of the human condition, the importance of concern for the welfare of other human beings, and the relationship between service to others and individual happiness. Extra-marital sexual relationships and abortion arguably fit into a different category, because people are divided as to which position has the weight of morality behind it. But does the Association of

American Law Schools need to take sides on that issue?

In the late 1960's I was living in Tempe, Arizona, at the time the Arizona State University Law School was founded. I followed its development rather closely, and was particularly fascinated by that school's unique allocation of faculty resources, about 1/3 to the first and second year students, and 2/3 to the third year. My skeptical reaction at the time has since been confirmed by my experience as a legal educator. I was pleased that they were trying the experiment because legal educators as a group might learn something from it. I suspect that most people respected them for a conscientious effort at improvement even when they felt the choice was wrong. Why should religious schools be entitled to any lesser deference, just because the differences are anchored in a system of religious values? As Father Timothy Healy, President of Georgetown University told us at the CLEPR meeting in Key Biscayne last fall, "Mediocre universities tend to be alike. Great universities are different. The same is true for law schools."

The history of our application for membership has been devoid of any intent to discriminate against church related schools. Nothing more has been involved than conscientious persons doing their best to interpret a standard. But that history illustrates the natural tendency of the regulator to regulate more rather than less, and in this context that means narrowing rather than broadening the range of options available to law faculties. It is the kind of thing that law schools most fear from other sources. It is also the kind of thing that the law school establishment should guard against in its own self governance.

c. As a membership association, the Association of American Law Schools should interpret its membership rules in such a way that its own interests are promoted. How are the interests of legal education possibly furthered by excluding schools that not only have religious moorings, but also take their religious values seriously?

The worst that can be said about such schools is that they are different. If there is a concern that moral values rooted in religious belief are somehow inimical to good legal education, then that issue ought to be addressed openly and directly. But aside from that possibility, it is difficult to perceive how an association of this nation's law schools is harmed if schools such as ours belong to it. There is no other discipline within our University that has been excluded from membership in its appropriate professional association. Whether we belong to the Association of American Law Schools or not, we will continue to educate law students, and our graduates will continue to take their place as members of the legal profession. We believe the quality of our program would be enhanced if we were a member of the Association. Presumably, we also have something to give, and the Association would benefit from our membership.

Under those circumstances there is no reason for the Association to interpret its standard any different than the ABA has interpreted its Standard 211. And indeed consistent interpretation between ABA accreditation and AALS membership constitutes a final argument against the Committee's proposed interpretation. It was announced at the Honolulu meeting of the American Bar Association that the Council of the Section on Legal Education and Admissions to the

Bar is delaying its revision of Standard 211 pending AALS consideration of its membership requirement dealing with the same issue. Serious constitutional questions would arise if the ABA were to impose a more stringent accreditation standard on schools with religious affiliations. The constitutional issue may be different in the case of the Association because of the question whether state action is involved but, state action or not, the Association should be as sensitive as any governmental entity in guarding against religious discrimination.

CONCLUSION

The Executive Committee's interpretative regulation should consist of two requirements, notice and a prohibition against invidious discrimination. There might properly be a requirement concerning program quality, but that is already built into the standards that every member law school has to meet. The diversity of the faculty and studentbody, including religious diversity, should be considered as part of the total inquiry into program quality. Academic freedom requirements should be the same as are applicable to all member schools.

The potential for mischief of the proposed subparagraph (d) is impossible to predict. Its extraordinary vagueness and its explanatory comments will almost certainly call forth an endless string of hypothetical questions. Trying to deal with extreme, but highly unlikely possibilities will tend to force institutional governing boards -- including the AALS Executive Committee -- into positions of lesser flexibility. The victims of this process will be the faculty and students of religiously affiliated law schools.

BYU Law School may be among those victims. If that happens, we will content ourselves with the knowledge that we had to choose between advantageous membership in a professional association, and honoring the values that make our school different. For us, the latter must weigh the heavier. But it is too bad that we have to be put to that choice.