Church-Related Law Schools: Academic Values and Deference to Religion
Sanford H. Kadish

Until recently we in the Association have given little thought to problems posed by law schools with religious affiliations, perhaps because no problems arose. The Bylaws said nothing relevant until 1970 when a proposal reached the Executive Committee to add sex to the list of considerations—race, color, national origin were already on it—that could not serve as a basis for discrimination. The Committee added religion to the list apparently with little consideration, and, so enlarged, the amended bylaw was passed at the annual meeting with no stir at all.

Only in the last several years, with the membership application of some church-affiliated schools that appeared to make distinctions on the basis of religion, was the issue given serious thought. It seemed to the Executive Committee that the new bylaw could not mean what it literally said. Distinctions on the basis of religion made to further the purposes of religiously affiliated law schools could not be equated with distinctions made on the basis of race, color, national origin, or sex. So the Committee tried to figure out the kinds of religious distinctions that did and did not amount to the discrimination contemplated by the bylaw. It produced a set of interpretive regulations, covering issues of academic freedom and privacy as well as discrimination, and remitted them to the mercies of the membership. The members were not merciful. The unfriendly reception given the regulations led the Executive Committee to withdraw them. There were two explanations. Either the regulations were not right or the

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1. These proposed regulations were as follows:

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

time was not. Being human, the Committee concluded it must be the latter. Henceforth, the Committee decided, it would approach these problems case-by-case as the occasion required.

But a second front opened at the American Bar Association. It appeared at first that the ABA would pass a revised standard that was acceptable enough to our Executive Committee and members to permit the Committee to proceed as planned. But this was not to be. Instead the ABA amended its antidiscrimination standard to create an exception for religious schools so long as they announce their policies in advance.

The Executive Committee then concluded that it could no longer assume it had the time for experience to make us wiser. The issue was

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 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.

2. The proposal was to add a revised Standard 211(a) to read as follows:

Standard 211(a) The law school shall maintain equality of opportunity by adopting and implementing its programs and policies governing education, including admissions, hiring, promotion and tenure without discrimination on the ground of race, color, national origin, sex, or religion; provided that a school may adopt programs and policies having to do with the school's religious tradition, if such programs and policies
(i) are adopted in good faith, with earliest possible written notice to applicants, students, faculty and employees, and do not constitute invidious discrimination among applicants for admission or employment;
(ii) do not infringe academic freedom or the free exercise of religion by students, faculty or employees; and
(iii) are consistent with sound educational policy and all of the other Standards.

3. The amended Standard 211 now reads as follows (new material is in italics):

211 The law school shall maintain equality of opportunity in legal education without discrimination or segregation on the ground of race, color, religion, national origin, or sex.

(a) [No change] ... 
(b) The law school shall not use admission policies that preclude a diverse student body in terms of race, color, religion, national origin or sex.
(c) [No change] ... 
(d) Nothing herein shall be construed to prevent a law school from having a religious affiliation and purpose and adopting policies of admission and employment that directly relate to such affiliation and purposes so long as notice of such policies has been provided to applicants, students, faculty and employees.
(e) [No change] ... 

Subsequently, the Council of the Section on Legal Education, in accordance with its authorized procedures, adopted the following authoritative statement:

Interpretation of Standard 211

Standard 211(d) shall be interpreted to permit religious policies and practices as to employment or admission only to the extent required by the Constitution. No other limitation on the constitutional rights of applicants for employment or admission is approvable under 211(d). The Standard is to be interpreted in a way that does not displace or modify any of the other Standards, including, but not limited to Standard 405(d) with respect to academic freedom.

With this interpretation before it, the ABA House of Delegates, on January 25, 1982, defeated a motion to rescind the August 1981 amendments of Standard 211. At the present time Standard
pressing and the Association needed to know where it stood. The Committee therefore set the general issue for discussion at this meeting of the House of Representatives. I decided to use the occasion of my presidential address to open the discussion with a sketch of the issues and an indication of my preliminary thoughts about them.

The problem the Association faces is how to deal with a set of concerns that have recently been raised by membership applications from several church-related law schools. Those concerns have arisen out of a variety of practices that either actually occurred at church-related schools or were thought possible enough to worry about. These practices are not of a piece. It helps to classify them in terms of the values that may be imperiled by them.

There is, first, the group of practices that raise issues of *academic freedom*—restraints on substantive positions that faculty and students are permitted to teach or advance, or those that require adherence to a set of beliefs as a continuing condition of enrollment or employment.

There is, second, the group of practices that appear to impinge on the value of *privacy*—those requiring conformity to standards of personal conduct, such as regulations governing dress or grooming, sexual behavior, smoking, drinking, use of language, and so on.

Finally, there are practices that discriminate by favoring or restricting admission or employment to persons of certain religions, thereby raising the issue of *equal treatment of persons*.

I will consider each of these groups of practices separately. In doing so I will assume three claims of interest that could legitimate our institutional concern with them: (1) that they interfere with the school's furnishing an adequate legal education to its students; (2) that they interfere with the school's ability to foster the advancement of knowledge; or (3) that they are incompatible with some important public policy not directly flowing from the mission of the law school. I will start with the practices that threaten the value of academic freedom.

The American Association of University Professors (AAUP) has been highly influential in defining and advancing academic freedom in American higher education. The evolution of its treatment of the theory of academic freedom and its applicability to church-related institutions provides a useful point of departure for us.

In 1915, the year of the AAUP's founding, its first President, John Dewey, appointed a distinguished committee to formulate principles to insure intellectual freedom in American colleges and universities. Its report

211, as amended, along with the Council's authoritative interpretation of it, governs law-school approval and reinspection. The issue, however, continues to generate controversy. The Council of the Section is considering further proposals to amend Section 211; and a motion to delete subsection (d) from Standard 211 will be before the House of Delegates at its August 1982 meeting.
grounded the case for academic freedom in the purposes for which universities exist—to advance knowledge, to educate students, and to provide expert counsel to governmental policy makers. These social purposes required that universities be governed as a public trust and not as an instrument of their founders or legal owners, whether private or public bodies. Both lay and public governing boards, therefore, were circumscribed in their legal authority over university affairs and over their professorial employees by a moral duty to serve these public functions. The case for respecting academic freedom rested on its indispensability for furthering these public purposes. Scientific activity in the pursuit of truth could not take place without this freedom because in all domains of knowledge “the first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results.” Moreover, without this freedom neither the students being taught nor the community being advised could have confidence in what a professor had to say.

But not all schools and colleges saw their mission in this way. Some were organized by their founders and financed by their supporters for the explicit purpose of advancing some particular version of the truth, deriving either from religious faith or from a secular belief. What should be said of these schools? The response of the Statement was not to condemn them. As Walter Metzger observed, “an outright condemnation of religious tests would...have clashed with the tradition of pluralism in religion and the tradition of laissez-faire in education, and would have been rashly enunciated by an association that was too young to have traditions of its own.” Instead, therefore, the Statement recognized that the trustees of these institutions have a right to carry out their purposes and to subordinate other values, including academic freedom, to them. If they make this choice, their institutions simply were not true universities but were “essentially proprietary institutions in the moral sense,” and all that the academic community could rightly demand is that they “not be permitted to sail under false colors”—their special purposes and practices would have to be explicitly stated in advance.

This approach served as the basis for the position of the AAUP, both in a later 1925 Conference Statement and in the 1940 Statement on Academic Freedom and Tenure, which has come to be regarded as the authoritative


5. Id. at 100.


7. 1915 Declaration of Principles, supra note 4, at 95.

8. A university or college may not impose any limitation upon the teacher’s freedom in the exposition of his own subject in the classroom or in addresses and publications outside the college, except in so far as... in the case of institutions of a denominational or partisan
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formulation of academic freedom. After justifying academic freedom in the same terms as the 1915 Statement and asserting the right of all professors to its enjoyment, the 1940 Statement rearticulates the qualification of the 1915 Statement: "Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment."

In the mid-1960s, however, the AAUP commenced a reexamination of the religious qualification. It found that a large and growing number of Protestant and Catholic institutions rejected the need for or the desirability of the religious limitation and that many fully accepted the canons of free scholarship in their internal regulations. These findings, as well as a long-standing disquiet with the limitation, led the AAUP to include the following comment in its 1970 Interpretive Comments to the 1940 Statement: "Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 Statement, and it [the AAUP Committee] does not now endorse such a departure."

The history has a bearing on what the law of our Association is now and on our consideration of what it should be. Academic freedom is dealt with directly only in Section 6-8(d) of the Bylaws. This provides that, "A faculty shall have academic freedom and tenure in accordance with the principles of the American Association of University Professors." Where does that leave us? If the reference were to the 1940 Statement the answer would be reasonably clear—we would have embraced the religious-school exception to the requirement of academic freedom. But the Bylaw refers to the "principles" of the AAUP, which, as we have seen, now differ from the 1940 Statement. Should our Bylaw be interpreted to refer to the 1940 Statement (as Standard 405(d) of the American Bar Association Standards explicitly does) or to the AAUP's principles as they are presently enunciated? The point is arguable, although the weight of the argument seems to me to rest with the former. In any event the uncertainty is a further reason for the Association to settle the matter. How should we settle it? Should we conform to the AAUP position as it was until 1970, should we follow its subsequent rejection of the exception, or should we adopt some in-between formulation?

character, specific stipulations in advance, fully understood and accepted by both parties, limit the scope and character of instruction.


10. Report of Committee A, 1969-1970, 56 AAUP Bull. 153, 167 (Summer 1970). Candor requires that I disclose my own participation in some of these developments as Chairman of Committee A and, later, as President of the AAUP.

11. The American Bar Association's recent amendment of Standard 211 follows the 1940 Statement in making a special exemption for church-related schools, but, on its face at least, the exemption is
The precise contours of academic freedom are arguable, but in general it signifies the intellectual autonomy of the members of the academic community—freedom of the faculty in research and teaching, freedom of the students in learning, and freedom of both from imposed conceptions of the truth. I have not heard it denied that academic freedom is a matter of legitimate concern to the Association. The case for Association promotion of academic freedom seems to me fully made on the first two grounds of relevance I adverted to earlier—the provision of an educational experience that properly prepares students for the intellectual tasks of a legal professional and the furtherance of conditions hospitable to the advancement of knowledge and understanding of the law. The case made for an exception is not that freedom and autonomy are inappropriate values for the Association to further, but that those very values require that we make room for institutions which conscientiously find those values outweighed by others. In other words, commitment to freedom and tolerance requires they be extended to schools that deny them. This is a position that would support the approach of the 1940 Statement.

The early AAUP theorists made no distinction between schools created to further particular secular commitments and those created to further a religious faith. Whether we think such a distinction is required for our purposes is a question that needs to be faced.

Let us begin by treating these cases separately, considering first a school that is set up to advance some secular doctrine. Assume a school that is organized to teach students that neoclassical economic analysis offers the best description of the development of law and the best guide to how it should be formulated; or a school that is set up to expound a socialist interpretation of the law. Assume further that as a condition of being hired or admitted faculty and students are required to accept these views and thereafter to conform their teaching, research, and learning to what is consistent with them. Is there a case for the Association to tolerate these schools, despite our commitment to academic freedom for the reasons I have just indicated? We might want to say, as the authors of the AAUP's 1915 Statement said, that such schools have a perfect right to exist and that more could not be demanded of them in a free society than that they clearly announce what they are and what they do. But we have a further question to answer: should we admit them to membership, even though we believe their practices diminish the quality of legal education they provide and of the research their faculty and students can perform, because we ourselves believe in freedom and tolerance for divergent
views? I would not think so. The issue is not whether those schools should be allowed to exist. It is whether we believe we would further the quality of legal education and legal research by excluding them. If we do, it would be a strange conclusion that our respect for freedom required that we act otherwise.

If my hypothetical Adam Smith and Karl Marx law schools only had an institutional position on a particular version of the truth, the case I am making would have somewhat less force. But they go further. They seek in addition to coerce faculty and students into acceptance of their institutional views by a variety of restraints upon what may be taught and argued, researched and written. I am not persuaded that our commitments to intellectual freedom of choice extend to accepting a school's freedom to impose its choices on its students and faculty. Of course there is value in the existence of schools with differing moral and intellectual perspective. But this value is substantially diminished where the special character of the school derives from an imposed conformity.

One must concede that even in a university in which academic freedom prevails a school could come to be dominated by a faculty who agree on some particular doctrine. A law school's teaching and scholarship, for example, might for some period of time be substantially Marxist or Adam Smithian; and faculty of contrary views might encounter difficulty in becoming hired or having their scholarly virtues recognized. There are law schools, as well as university departments, which are thought by some to be more or less of this character and some of them are distinguished places of learning and scholarship. Does this refute the force of the argument for academic freedom as necessary for a law school of quality? I do not think so. Academic freedom does not require a faculty of divergent intellectual positions or that a faculty discount its own judgment of what is sound scholarship in passing upon candidates or colleagues. What it requires is that acceptance of the truth of some doctrine not be imposed as a test of acceptable learning and scholarship.

How much does this distinction amount to? Doesn't a true-believer mentality of a like-minded faculty produce the same consequences as restraints imposed by the institution? Not altogether. Students, at least, would be free to come to their own conclusions. But yes, to some degree the consequences would be similar—a self-imposed orthodoxy can be as chilling as an externally imposed one. Still, there is this important difference. So long as the faculty, true believers though they be, avow adherence to the principle of academic freedom, voluntary acceptance can turn to voluntary rejection or qualification; imposed acceptance precludes that possibility. Indeed, it has been the natural history of schools and departments that have become identified with particular doctrines or precepts that in time they cease to be so identified; and this happens, I submit, because the commitment to the principle of intellectual challenge and
dissent continues.

Let me turn now to what is central on our agenda—schools set up to advance some religious doctrine. How strong is the argument that the Association should find it acceptable for those schools to limit academic freedom, even though it would not deem it acceptable for schools organized to advance some secular doctrines?

The argument against such a distinction is powerful. We insist on academic freedom, after all, because it is crucially important for the quality of legal education and research. If a school that does not respect academic freedom cannot reliably function to assure the level of education and research we require for membership in our Association, how can it matter for our institutional purposes that its rejection derives from religious faith rather than from secular commitments? Consider a church-related medical school that does not permit instruction or research on the use of medicine and blood transfusions because those medical options are incompatible with the school's religious precepts. Surely an association of medical schools dedicated to the best training of medical practitioners and to medical research could not be faulted for denying membership to such a school—nor could a law-school association for insisting on what it regards as highly important for quality legal education and research.

If this conclusion is to be resisted (and I am by no means clear that it should be) the ground has to be the special place freedom of religion has come to have in our scheme of social values. The constitutional decisions of the Supreme Court have contributed a great deal to the special treatment of religious practices. I do not mean to make the argument that the Association is necessarily compelled by these decisions to qualify its position on academic freedom. But those decisions have a normative authority which an association like ours should not lightly ignore. Without attempting to suggest what the Supreme Court would require of us if we were subject to the 14th Amendment, it is at least clear that the Court has come to require a higher threshold of justification to sustain a governmental action that burdens conduct based on religious beliefs than that required to sustain an action that burdens secular practices. If we wish to act with comparable sensitivity to religious values and yet not give up our claims for academic freedom, what course is open to us? I am frankly unsure there is such a course. If there is, it may lie in our willingness to make distinctions among violations of academic freedom in terms of their gravity and impact. Normally we are unwilling to do this. Not because we think that any and every restraint of whatever nature on teaching or research itself factually demonstrates that the quality of the school's instruction and research is substandard, but because anything less than a conclusive presumption would be difficult to administer and would in the

long run disserve the goal of maximum compliance with the principle of academic freedom. But would we give up too much to make a narrow exception for church-related schools to this extent: that we would permit an inquiry into how far some practice that is absolutely required by religious doctrine, but that conflicts with academic freedom, threatens seriously to impair the quality of the school's teaching and research? I leave it as a question. The great virtue of permitting such an inquiry is its consistency with the policy of accommodating religious practices. Its great defect is that it would weaken the hands of those faculty and administrators whose past efforts have been so successful in maintaining a high level of academic freedom at church-related schools.

In the time remaining I will comment on the other practices that have given concern—those that imperil the value of privacy and those that imperil the value of equal treatment of persons. I can be briefer because in discussing academic freedom I have already stated my view of the considerations that should guide our judgment.

Privacy of students and professors, indeed, of all persons employed by a university, is a precious value. Whether people choose to drink or smoke, how they dress or wear their hair, their sexual preferences, and matrimonial habits, are, in my view, no one's business but theirs. But I do not believe a credible case can be made that a private school's regulation of these practices, wherever they take place, has any significant bearing on the quality of the school's legal education or research. It can be argued that an imposed conformity of personal conduct leads to a conformity of thought, but I doubt that so speculative a judgment could justify the Association in excluding a school on educational grounds.

There remains, of course, the interest of the Association in furthering a public policy—in this instance, respect for the privacy rights of persons—even where education and research are not strongly implicated. I do not regard this as a trivial consideration. Public schools may be constitutionally prohibited from interfering with some of these practices in some circumstances, and the Association could (though it has not done so before) fairly seek to influence private schools to accept the same standards. But where those practices flow directly from religious convictions I do not see the public-policy argument even marginally adequate, in view of the powerful policy of special deference to religion I have just noted.

Practices that imperil equal treatment of persons are more troubling. The Association's concern with discrimination began as a civil-rights concern rather than as an educational one. In 1950 the Association adopted a bylaw declaring equality of opportunity without regard to race or color to be an Association objective; in 1957 it made nondiscrimination on these grounds a membership requirement; in 1970 it extended the prohibition to sex and religious discrimination. But as far as one can tell the reason was not to assure educational quality but to protect the right of
persons to equal treatment. Whether educational quality affords an additional reason for our concern with discrimination has been a controversial issue. Certainly the view has high authority that a school's interest in achieving a racially diverse student body in order to further its educational purposes is a compelling one. Whether the same may be said of sexual diversity, or whether the Association should go further and conclude that a racially or sexually diverse student body is necessary for an adequate legal education—so far it has not said so—we need not settle now. For the issue we face is the educational import of religious diversity.

My own view is that its import is not great. Religions usually cut across racial, ethnic, sex, class, geographic, and most other lines and there is little ground for concluding that a student body mainly or even entirely of one religion necessarily cannot possess that diversity of perspective which enhances the educational experience. Even if there is more to the educational value of religious diversity than I would allow, I greatly doubt that the case can be strong enough to overcome the special regard for religion that I have stressed before.

(Parenthetically, let me emphasize that I have been considering discrimination only on the basis of membership in the favored church. If the discrimination is based on adherence to particular church doctrine in the professional work of the teacher and student, the problem becomes one of academic freedom, about which I spoke earlier.)

But is there an important social policy, apart from the Association's interest in legal education and research, which can justify the Association in excluding schools that discriminate on grounds of religion? Surely there is a policy of the most compelling moral force in protecting persons in their right to be free of discrimination directed against them because of their sex or race. It is a right protected by the Constitution against action under color of law, with singularly few qualifications, and protected by federal and state legislation against private action. I have no doubt of the Association's right, if not its duty, to exclude schools which transgress so fundamental and widely recognized a right, no matter how adequate their legal education and research.

Can the same be said of discrimination on religious grounds? Certainly it can so far as governmental action is concerned; and it can so far as private action is concerned, in all cases but one—where the discrimination takes the form of favoring members of the church with which the school is affiliated. For the First Amendment's guarantee of the right to engage in the free exercise of religion establishes a compelling qualification to the policy against religious discrimination. This policy is manifest not only in the Constitution and in the decisions of the Supreme Court but in legislation itself, of which the Civil Rights Act is the clearest

example. Title IX bans sex discrimination in federally supported educational programs but exempts schools controlled by a religious organization if the ban is inconsistent with their religious tenets.\textsuperscript{14} Title VII prohibits employers from discriminating on grounds of race, color, religion, sex, or national origin but permits religious organizations to discriminate in favor of employees of their own religion.\textsuperscript{15} Title VIII provides a comparable exemption from its ban on discrimination in renting or selling housing, provided, quite properly I think, that church membership is not restricted on account of race, color, or national origin.\textsuperscript{16}

As a private association we are probably not obliged to adopt the same exemption for religious law schools in their admission of students and hiring of faculty. But, as I said earlier, those constitutional restraints and legislative actions respond to a deep-rooted moral tradition which I do not believe we can justly ignore.

Let me conclude with two disclaimers. First, what I have said is purely my personal opinion. I have not been speaking for the Association, for its Executive Committee, or for any other body of the Association. Second, whatever excess of certitude my words may have conveyed I ask you to put down to rhetoric. This is the way it all seems to me now. It has seemed to me different before and I make no warranties that it will not seem to me different again after the discussion that is now to take place.