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Barbara Cox

California Western School of Law, bjc@cwsl.edu

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Time for a Change: 20 Years after the “Working Group” Principles

Barbara J. Cox

The Association of American Law Schools (AALS) Section on Sexual Orientation and Gender Identity (SOGI) has been an important part of my academic career since I began teaching.¹ In 1987, I received a call from section chair Jean Love (Iowa then, Santa Clara now) asking me to get involved in the section because it needed more women on its Executive Committee. I served as secretary in 1988 and 1989, as chair-elect in 1990, and as chair in 1991. As described below, my work with the section provided me with valuable opportunities to get more deeply involved with legal education at the national level and the full range of AALS activities. I encourage all faculty members, especially new ones, to get involved with section activities and volunteer for leadership opportunities. My academic career would not have been as rich without this engagement with the AALS and the important issues facing legal education over my career.

This article discusses three aspects of the SOGI Section’s history. First, it reviews the section’s activities at the 1992 AALS Annual Meeting. Second, it discusses how the AALS implemented its Bylaw and Executive Committee Regulations that prohibit discrimination on the basis of sexual orientation (and now gender identity after a recent revision). Finally, it encourages the AALS to discontinue use of some of the guidelines adopted in the early 1990s to guide its interactions with religiously affiliated law schools when conflicts arise concerning allegations of sexual orientation or gender identity discrimination.

At the 1992 Annual Meeting, I moderated the section panel on “Using State Constitutional Law to Advance the Rights of Gay Men and Lesbians.” The panelists were Marc A. Fajer of the University of Miami School of Law; Sheila James Kuehl, then of the Southern California Women’s Law Center and currently serving on the Los Angeles County Board of Supervisors;² Shirley

Barbara J. Cox is Vice Dean for Academic Affairs and Clara Foltz Professor of Law, California Western School of Law.

1. I became a tenure-track assistant professor at California Western School of Law, San Diego, in July 1987. Before that, I served for four years in the legal writing program at the University of Wisconsin Law School with a joint appointment in the Women’s Studies Department for the last two years.
2. See Catherine Saillant, Abby Sewell & James Rainey, *Kuehl’s Victory No Guarantee of Pro-Labor Bloc*, L.A. TIMES, Nov. 16, 2014, at A1; www.supervisorkuehl.com (last visited Apr. 18, 2016).

A. Wiegand, then at the University of Oklahoma; and J. Patrick Wiseman, Esq., of Richards, Wiseman & Durst.³ Our second panel was on “Women, AIDS, and Health Care,” and co-sponsored with the Medicine and Health Care Section. The panelists were Taunya Lovell Banks of the University of Maryland School of Law; Karen H. Rothenberg, at the time also from the University of Maryland; and Dr. Mary Young of the Georgetown University Division of Infectious Diseases; Anne B. Goldstein of Western New England University School of Law moderated.⁴ Both sessions were well-attended. Fifty people attended the section’s business meeting, and a social gathering with the San Antonio lesbian and gay bar association followed.⁵ Section officers should consider the valuable opportunities that come from co-sponsoring programs with other sections. Not only does this provide additional opportunities for section members to present their scholarly work at the Annual Meeting, but it also promotes intersection engagement and interdisciplinary opportunities.

The section made an important move forward at the 1990 House of Representatives meeting at which the House amended Bylaw 6-4(a) (now 6-3(a)) by adding “age, handicap or disability, or sexual orientation” to its nondiscrimination provision.⁶ Although new to the section, I remember being ecstatic that more than two-thirds of the member schools voted in favor of adding these protections to the Bylaw.⁷

The focus of my time as chair of the section and afterward has been most concerned with two issues: (1) how the AALS would implement Bylaw 6-4(a) (now 6-3(a)) across its member schools; and (2) how it would implement that Bylaw and Executive Committee Regulation (ECR) 6.17 (now 6-3.1), concerning law schools with a religious affiliation or purpose.⁸ In December 1991, toward the end of my service as chair, I was appointed to serve on the “AALS Executive Committee Regulation 6.17 Working Group” (Working Group), established by the AALS Executive Committee (EC), and I served in this capacity through November 1993.⁹ I later served as AALS interim

3. See 1992 ASS’N OF AM. L. SCHS. PROC.43.

4. *Id.* at 78, 85.

5. *Id.* at 418-19.

6. See 1990 ASS’N OF AM. L. SCHS. PROC. 196-203.

7. Bylaw 8-3 states that a two-thirds vote is needed to amend any Bylaw. Bylaw 6-4(a) was amended by a voice vote. See 1990 ASS’N OF AM. L. SCHS. PROC., *supra* note 6, at 202-03. *Bylaw Section 8-3, Amendments: Voting*, in ASS’N OF AM. L. SCHS., ASSOCIATION HANDBOOK 27 (1990).

8. See *Executive Committee Regulations of the Association of American Law Schools 6-3.1*, in ASS’N OF AM. L. SCHS., 2016 HANDBOOK 83 (2016) (hereinafter AALS 2016 HANDBOOK). ECR 6-3.1 states that religiously affiliated law schools may use preferential admissions or employment practices for students, faculty, or staff before their affiliation with the law school as long as those “practices do not discriminate on the ground of race, color, national origin, sex, age, disability or sexual orientation. . . .”

9. The result of this work was the 1993 document *Interpretative Principles to Guide Religiously Affiliated Member Schools as They Implement Bylaw Section 6-4(a) and Executive Committee Regulation 6.17*, in ASS’N OF AM. L. SCHS., 1994 HANDBOOK 81 (1994). See also Carl C. Monk, *Remarks Delivered at the*

deputy director for part of 1998-1999, and I served on the Membership Review Committee (MRC), which oversaw the AALS portion of the ABA/AALS accreditation process, from January 1999 to December 2001. I was originally appointed to the Working Group because I was serving as chair of the section when it was formed. Afterward, I became deeply involved in the membership review process of the AALS and was provided the opportunity to do scholarly and historical research into its efforts to enforce Bylaw 6-4(a). But for my willingness to take that first step and serve as a section officer, these and other opportunities may not have arisen. While the AALS grappled with challenging issues of enforcement and membership, I had the chance to participate and help to add the section's viewpoint to those issues it was considering.

This involvement with the AALS led to my article *AALS as Creative Problem-Solver: Implementing Bylaw 6-4(a) to Prohibit Discrimination on the Basis of Sexual Orientation in Legal Education*.¹⁰ This article was an in-depth look at how the AALS implemented its revised Bylaw between 1990 and 2002. In the article, I tracked every member school from revision of the Bylaw in 1990 until that school adopted a written policy prohibiting discrimination based on sexual orientation or until the end of 2002, whichever came first.¹¹ I also tracked the policy decisions made by the MRC and the EC related to Bylaw 6-4(a) and ECR 6.17 between 1989 and 2002.¹² All this research was permitted by AALS ECR 5.7, which allows the executive director to provide access to the confidential files of the AALS for research purposes.¹³

During this period, 107 of 162 member schools had or adopted compliant nondiscrimination policies that included sexual orientation without requiring any interaction with the AALS.¹⁴ But fifty-five schools required time and effort before agreeing to adopt such policies, and twenty-five of those schools either required significant time or appeared to actively resist AALS efforts to require compliant policies through the MRC process.¹⁵

The magnitude of the AALS member schools' voting to adopt Bylaw 6-4(a) by a voice vote and implementing it despite significant resistance from many member schools must be understood within the broader societal context. Only by situating these decisions within this broader context can this bold action by the AALS be appropriately recognized.

Conference of Religiously Affiliated Law Schools: Commentary on Destro, 78 MARQ. L. REV. 377, 382 (1995) (reprinting a copy of the Final Report of the AALS Executive Committee Regulation 6.17 Working Group).

10. 56 J. LEGAL EDUC. 22 (2006).

11. *Id.* at 24-25.

12. *Id.* at 29-55.

13. *Id.* at 24. Executive Director Carl Monk approved this research project, and I had access to all the MRC and EC files during this period.

14. *Id.* at 25-26. The AALS now has 178 member schools. See *Members of the Association*, ASS'N OF AM. L. SCHS., 2016 HANDBOOK 37 (2016).

15. Cox, *supra* note 10, at 25.

In 1990, at the time the Bylaw was amended, only two states prohibited sexual orientation discrimination. During this same period, efforts to create equal rights for same-sex couples were increasing across the U.S., as were the backlash against and resistance to these efforts. By 1990, numerous cities and employers had adopted domestic partnership ordinances and policies providing some limited rights to registered same-sex couples.¹⁶ While these efforts were not directly considered during the time the AALS was enforcing its nondiscrimination bylaw, the pressures from that larger social discussion led many states and schools to take a strong stance against legal rights for same-sex couples.

In 1993, the Hawaii Supreme Court issued its *Baehr v. Lewin* opinion, holding that denying marriage licenses could be sex discrimination.¹⁷ In the aftermath of that opinion, between 1993 and 2003, more than forty states adopted statutes and constitutional amendments prohibiting same-sex couples from marrying in those states and refusing to recognize marriages from other states.¹⁸ It was during this same period that Congress and President Bill Clinton adopted the (so-called) *Defense of Marriage Act*.¹⁹ It is important to recognize this broader context when considering the work of the AALS in its effort to prohibit sexual orientation discrimination in the legal academy. Much of the resistance that the AALS encountered may have been inflamed by the societal dissension outside the legal academy.

By the time my article was published and all AALS member schools had adopted (at least formally) compliant nondiscrimination policies, only thirteen additional states had prohibited such discrimination.²⁰ Today, twenty states and the District of Columbia prohibit discrimination based on sexual orientation and gender identity/expression, and two other states prohibit discrimination based on sexual orientation, although no federal law has been adopted.²¹

16. Barbara J. Cox, *From One Town's "Alternative Families" Ordinance to Marriage Equality Nationwide*, 52 CAL. W. L. REV. 65, 68 (2015) (hereinafter Cox, *From One Town*).
17. *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993), *reh'g granted in part*, 875 P.2d 225 (Haw. 1993), *remanded to Baehr v. Muike*, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff'g order*, 950 P.2d 1234 (Haw. 1997), *and rev'd and remanded*, 994 P.2d 566 (Haw. 1999), *and rev'd and remanded*, No. 20371, 1999 WL 35643448 (Haw. Dec. 9, 1999).
18. Cox, *From One Town*, *supra* note 16, at 73.
19. *Id.* Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2012), overruled in part by *United States v. Windsor*, 133 S. Ct. 2675 (2013) (whereby the definitional provision was held unconstitutional) and abrogated in part by *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (which undermined the constitutionality of the non-recognition provision).
20. Cox, *supra* note 10, at 26 n.9.
21. See *Nondiscrimination Laws*, MOVEMENT ADVANCE PROJECT (Nov. 3, 2016), http://www.lgbtmap.org/equality-maps/non_discrimination_laws [<https://perma.cc/ECH3-CBN4>]. Although no federal law exists, the U.S. Equal Employment Opportunities Commission has issued "rulings . . . extending Title VII's prohibition on sex discrimination to prohibit discrimination on the bases of sexual orientation and gender identity." *Id.*

Despite this limited legal protection, the AALS implemented Bylaw 6-4(a) across a diverse membership consisting of schools from every region of the country, whether private, public, or religiously affiliated. It did so without losing a single member school, despite threats of such defections throughout the process. It also did so without sanctioning any school.²²

This broader context also helps to explain why the AALS adopted “Interpretative Principles” that were based on a status/conduct distinction. At a time when the Supreme Court permitted states to criminalize same-sex sexual conduct,²³ it is not surprising that the Working Group concluded that a status/conduct distinction was an appropriate compromise for guiding the AALS’s interactions with religiously affiliated schools over its requirement that all member schools adopt nondiscrimination policies that included all protected classes, including sexual orientation.

The Working Group ultimately consisted of three EC members, three SOGI Section members, and three representatives from religiously affiliated schools.²⁴ In an effort to achieve consensus, the Working Group created Interpretative Principle 4, which recognized that some states still criminalized same-sex sexual conduct under *Bowers v. Hardwick*.²⁵ The Working Group ultimately compromised on the following language:

When [Bylaw 6-4(a) is] applied to religiously affiliated schools, that absolute protection of the status of sexual orientation continues, but in the unique context of religious liberty, Bylaw 6-4(a) and ECR 6.17 should be interpreted to permit the regulation of conduct when that conduct is directly incompatible with the essential religious tenets and values of a member school.²⁶

Discomfort with this status/conduct distinction, even under the *Bowers* regime, led the three SOGI representatives to insist on writing an “Additional Statement” that expressed our reservations. In that statement, we explained that “[f]orcing the sexual orientation/sexual conduct distinction places a premium on remaining undisclosed and undetected. We are troubled to the extent that a nondiscrimination Bylaw intended to reduce the cost of being ‘out of the closet’ would do just the opposite.”²⁷ In closing, we explained:

For the limited purpose of describing how religiously affiliated schools may comply with the Association’s Bylaws and Executive Committee Regulations,

22. Cox, *supra* note 10, at 26.

23. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

24. See Monk, *supra* note 9, at 387 (listing the Working Group members). The section’s representatives also included Art Leonard of New York Law School and Robert G. Wasson, Jr., of Suffolk University Law School.

25. See *supra* note 19. *Bowers* was overturned by *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down sodomy laws as a violation of the due process clause).

26. Monk, *supra* note 9, at 385.

27. *Id.* at 388.

we acknowledge that a distinction between sexual conduct and sexual orientation may be necessary to provide the maximum protection from discrimination presently attainable. *We hope, however, that the time will come when religiously affiliated institutions will revise their policies to provide appropriate respect for the privacy of their community members.*²⁸

Now that more than twenty years have passed since these principles were established, the AALS should reconsider its continuing use of these Working Group guidelines, as the “status/conduct” distinction that was questionable even in 1993 is no longer viable. As shown by the experiences of military service members during the “don’t ask, don’t tell” era, distinguishing between status and conduct simply creates an environment in which private conduct can be used to create a climate of fear and distrust.²⁹ Additionally, because of the Supreme Court’s decisions in *Romer v. Evans*,³⁰ *Lawrence v. Texas*,³¹ *United States v. Windsor*,³² and *Obergefell v. Hodges*,³³ the continued adherence to the status/conduct distinction contained in Principle 4 has lost any possible legal underpinning. For example, marriage equality has now spread across the country, even in conservative states with numerous religiously affiliated law schools. It would become increasingly problematic if the AALS were to permit schools to use the status/conduct distinction contained in Principle 4 to defend themselves against challenges that might arise from a law school’s refusal to recognize the legal marriages of its same-sex faculty, staff, and students.

Despite the amazing changes in legal regulation of sexual conduct and legal protection for LGBTQ individuals, couples, and families over the past twenty-three years, the AALS has not revisited the Working Group Principles that were adopted in 1993. LGBTQ protections have changed drastically between 1993, when *Bowers* was the law of the land and states could criminalize same-sex sexual conduct, and 2016, when marriage for same-sex couples exists in every state, and “don’t ask, don’t tell” has been repealed. It is time for the AALS to reconsider Working Group Principle 4, which allows a religiously affiliated law school to take adverse action against a person based on his or her private sexual conduct if that conduct conflicts with the sponsoring religion’s essential tenets.

28. *Id.*

29. See Barack Obama, *Statement on the Repeal of the United States Military’s “Don’t Ask, Don’t Tell” Policy*, 2 PUB. PAPERS 1092 (Sept. 20, 2011), <https://www.gpo.gov/fdsys/pkg/PPP-2011-book2/pdf/PPP-2011-book2-Doc-pg1092.pdf> [<https://perma.cc/2X6H-9RP9>].

30. 517 U.S. 620 (1996) (striking down class-based legislation directed at LGBTQ people as a violation of the equal protection clause).

31. 539 U.S. 558 (2003) (striking down sodomy laws as a violation of the due process clause).

32. 133 S. Ct. 2675 (2013) (striking down Section 3 of the Defense of Marriage Act as unconstitutional under the due process clause).

33. 135 S. Ct. 2584 (2015) (holding marriage equality for same-sex couples is constitutionally required by the Fourteenth Amendment). *But cf.* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (may provide an out to religiously-affiliated law schools if they chose to pursue it).

The AALS has, however, made significant progress by revising Bylaws 6-3(a) and (b) to include “gender identity and expression.” This change followed a discussion at the June 2014 AALS Midyear Workshop on Sexual Orientation and Gender Identity.³⁴ At that meeting, I joined Ellen Podgor of Stetson University College of Law, the 2014 SOGI Section chair, in leading a discussion of section members concerning the importance of asking the AALS to amend 6-3(a) and (b) to add “gender identity” where appropriate and to expand the push for affirmative action contained in Bylaw 6-3(c) to include “sexual orientation and gender identity.” AALS Executive Director Judith Areen and Associate Director Regina F. Burch attended the meeting. Professor Podgor and I also made a presentation to the EC on these issues on November 7, 2014.

Director Areen issued Deans’ Memorandum 15-06 on June 15, 2015, indicating that the AALS Executive Committee had approved revisions of the Association’s Bylaws for consideration at the January 2016 Annual Meeting.³⁵ Acknowledging the SOGI Section’s request for the amendment, the EC proposed amending Bylaws Sections 6.3(a) and 6.3(b) to include protection from discrimination on the basis of “gender (including identity and expression).”³⁶ That change was adopted by two-thirds of the AALS member schools at the January 2016 meeting.³⁷

The legal academy has changed significantly in the twenty-five years since I served as chair of the SOGI Section. Countless professors and staff members are openly gay and have obtained protection for our sexual minority status and recognition of our relationships. Many of us who have been engaged over the intervening years admire the courage of the AALS in pursuing protections for members of the academy based on sexual orientation and gender identity. The time has come for the AALS to revise its Working Group Principles or curtail their ongoing use. Those Principles have lost their legal underpinning and conflict with the Association’s Bylaws. All member schools of the AALS should be required to comply with the Association’s core value of nondiscrimination.³⁸

34. See Barbara J. Cox, *2014 AALS Workshop on Sexual Orientation and Gender Identity Issues*, AALS NEWS (Ass’n of Am. L. Schs.), Aug. 2014, at 8.

35. See Memorandum 15-06 from Judith Areen, Dir., Ass’n of Am. Law Schs., to Deans of AALS Member Schools (June 15, 2015) (copy on file with author).

36. *Id.* at 4.

37. See *Bylaws 6-3(a)-(b)*, in AALS 2016 HANDBOOK, *supra* note 8, at 57.

38. See *Membership and Core Values*, in AALS 2016 HANDBOOK, *supra* note 8, at 3.