From the Editors

We are pleased to present two sets of articles that provide detailed and diverse perspectives on two issues of signal importance to the legal academy. Also, we have three book reviews—Alan Morrison's informed and informative description of *The Burger Court and the Rise of the Judicial Right* by Linda Greenhouse and Michael Graetz; David Ziff's thoughtful and engaging *defense* (!) of that most maligned of texts, *The Bluebook: A Uniform System of Citation*; and William Slomanson's tongue-in-cheek poetic tribute to one of *The Bluebook*'s most succinct competitors, *Practical Citation System* (from the Berkeley Journal of Gender, Law & Justice).

The first set of articles provides an in-depth history of the founding of the Association of American Law Schools (AALS) Section on Sexual Orientation and Gender Identity Issues and that section's signal work on combating discrimination within and without the legal academy. Dean Kellye Testy, AALS Past President and Dean at the University of Washington School of Law, along with Julie Shapiro, Professor of Law at Seattle University School of Law, provide a more detailed introduction to those articles below.

The second set of articles addresses American Bar Association Accreditation Standard 405(c), a standard that has generated controversy since at least 2008. Standard 405 sets minimum standards for the employment terms of all law faculty at accredited law schools. Some critics object, saying that the ABA should not use the accreditation process to regulate faculty terms of appointment. Others believe that the ABA should do so, but have concerns that the standard is unclear, unfair, or both. For readers new to this topic, it will be helpful to understand that Standard 405(c) establishes different minimum terms of employment, depending upon whether the faculty are tenured or tenure-track, clinical, or legal writing faculty. Subsection (c), in particular, provides that clinical faculty should be eligible for multiple-year contracts and should have job security "reasonably similar to tenure." As law schools face pressure to provide students with more experiential-learning opportunities and skills training, it will likely become more important for the academy to understand what Subsection (c) means and to engage (yet again!) in dialogue about whether and how Standard 405 could be improved. These articles are meant to start that conversation. A more detailed introduction appears below.

Kate O'Neill
Kellye Testy

Introduction to
The AALS Section on Sexual Orientation and Gender Identity Articles

With great honor, we are delighted to introduce the articles in this symposium exploring the founding, development and work of the AALS Section on Sexual Orientation and Gender Identity. The section was first founded in 1983 as the Section on Gay and Lesbian Legal Issues, and its story is the story of the struggle for LGBTQ equality. Early leaders of the section, the eight symposium authors have lived this history personally and professionally while profoundly influencing the academy, the legal profession, and our society in the struggle for greater equality for LGBTQ people.

We are fortunate to capture these narrative essays of many of the section's leaders so that we can preserve a thick description of what has been accomplished in what is now almost thirty-five years (dare we say, a generation) of the section's existence. In publishing this collection, we thank and recognize the authors not only for sharing their remembrances and reflections, but also for the defining influence that they have had, individually and collectively, in advancing justice and equality through the integration of their teaching, scholarship, service, and activism.

The essays cover a lot of ground. In a wonderful "call and response" format, Professors Pat Cain and Jean Love share their now more-than-thirty-year love story, one that is deeply connected with the section's founding and many of its most significant developments. Professor Art Leonard, a critical leader in the section's founding and development, details not only how many of the section's goals have been accomplished but also how significantly entwined the section's development was with many social issues, including the AIDS crisis.

Professors Elvia Arriola, Nancy Polikoff and Ruthann Robson share reflections on their personal journeys in the legal academy as they encountered instances of support and exclusion as early openly lesbian law professors. Professor Arriola probes the complexities she encountered as both a racial and sexual minority and how the exclusion and hostility she encountered also led her to become one of the academy's most insightful critical scholars. Professor Polikoff's reflections on incorporating her activism and legal practice into her scholarship and Professor Robson's nuanced reflections on teaching and mentoring should both be required reading for all law faculty.

Professor Frank Valdes shares his reflections on a particularly contentious period in the late '90s as the legal academy saw hard-fought progress on equality for LGBTQ persons encounter significant resistance, especially in the form of the Solomon Amendments. Professor Barbara Cox, who played an especially important role in helping AALS forge a successful compromise in the 1990s for interpreting its nondiscrimination bylaw in the context of religiously affiliated law schools, eloquently argues that the compromise may no longer be appropriate in the context of significant legal and social gains for LGBTQ equality.

While these outstanding essays speak perfectly well for themselves, we offer a brief reflection that we hope adds to our readers' enjoyment and appreciation for them. It is evident in each of these essays how much the section was shaped and directed by people who were immersed in the struggle in their own lives. We do not think that is a coincidence. While allies are surely important to all movements, only those in the midst of things can really say "here is what we need, here is what is useful, here is what we should do." Experience matters. The personal is, after all, political.

At the same time, like us, all the authors have a necessarily partial view. (This is virtually inevitable when work is shaped by the passions of a well-lived life.) We have spent our careers in the legal academy. Many of our struggles are set in that context. While we may spend time working as community organizers or with community organizers, we are not primarily community organizers. We are teachers, mentors and scholars. Further, we are all of a specific generation—or perhaps several specific generations. We all came of age well before Massachusetts permitted marriage between people of the same sex and a pro-LGBTQ president inhabited the White House.

The connection between lived experience and political and legal struggles is further instructive. As deeply as we respect these authors (and, to be clear, we are part of the same generation and walked many of these miles together with them), those "in the midst of things" are no longer this group. That does not mean that the struggle for LGBTQ equality is complete—far from it—or that there are not significant differences among and between us. Neither does it mean that there is not much to learn from these reflections that can inform current struggles. But others are now more with/in/amid the current struggles.

Those struggles have become ever more complicated and contested. Challenges to the very idea of a gender binary are critical in the eyes of some and undermine the very definition of lesbian and gay to others. Trans rights have become a political lightning rod. Clearly it is a time for new generations to step in and, drawing on their own passions and experiences, offer the frameworks that will help us all find the way forward.

Julie Shapiro

Kellye Y. Testy

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Introduction to ABA Standard 405(c) Articles

The papers on ABA Standard 405 ask our readers to confront the question of whether the academy and its accreditors are governing ourselves fairly or sensibly with regard to faculty employment security. The issue is whether it is fair or wise for the ABA, or any other body, such as the AALS, to set different minimum employment-security terms for full-time law faculty based expressly on what and how they teach and perhaps implicitly and de facto on their racial or gender identities. At present ABA Standard 405 sets accreditation standards that expressly differentiate the minimum employment terms for tenure-track, clinical, and legal writing faculty. These articles explore the ramifications for law school faculty appointment, retention, and promotion practices, with particular emphasis on the implications for faculty who have or may acquire 405(c) status.

Professor Melissa Weresh opens this group of articles by articulating and advocating "best practices" that would spell out the terms under which a law school could terminate a 405(c) contract or refuse to renew it for faculty who had earned 405(c) status and due process rights similar to, but not necessarily identical to, those accorded to tenured faculty. Weresh recognizes that this is a compromise position, as it does not require a school to adopt a unitary tenure track for all faculty or separate tenure tracks for different faculty groups, and it does not depend upon revision of Standard 405.

The editors solicited the remaining articles to provide readers with more insight into the diverse objections to Standard 405(c) and the difficulties the ABA Standards Review Committee and the ABA Council have had in formulating a resolution that is reasonably acceptable to the various stakeholders. The articles are loosely grouped according to their principal theses.

Professor Linda Berger analyzes the standard's rhetoric to expose its hierarchical assumptions, pointing out that the standard provides greater job security to categories of law teachers based on generalizations about subject matter and pedagogy, rather than on the quality of individuals' teaching or scholarship or on the need to protect academic freedom. Instead it assumes the validity of and perpetuates inherited faculty status hierarchies.

Professor Kathryn Stanchi is highly dubious that even best practices can ameliorate Standard 405's flaws. She argues that its categorization of law teachers is irrational because it is not designed to protect and reward great teaching and scholarship, and that its categorizations are discriminatory because women and minorities are disproportionately represented in the categories of faculty given less job security. Professor Kristen Tiscione analyzes additional demographic data to support the argument that Standard 405 may enable sex discrimination by law schools. Full-time clinical and legal writing faculty—those groups that have or may earn 405(c) status—are disproportionately female, compared with tenure-track and tenured faculty.

Professor Teri McMurtry-Chubb extends the analysis to racial discrimination, showing that faculty of color, particularly women of color, who are categorized as 405(c) faculty suffer additional disadvantages, as they are not only afforded less job security and status than tenure-track faculty, but are also disproportionately required to report to clinic and legal writing directors, the great majority of whom are white.

Professors Ann McGinley and Richard Neumann address the legal and practical implications of Berger's, Stanchi's, Tiscione's, and McMurtry-Chubb's analyses. McGinley summarizes the elements of employment discrimination claims under federal Title VII and Title IX and explains what plaintiffs must allege to challenge Standard 405 as discriminatory on its face or in its impact. Neumann presents a detailed analysis of what tenure means and does not mean, and explains why Weresh's best practices, if not unitary tenure, are both financially and administratively feasible for law schools. He counters an assumption that law schools simply cannot afford to provide substantive and due-process protections for all full-time faculty after they pass a probationary period.

We close this group of papers with two articles solicited upon short notice to provide some broader institutional and historical context about a number of other issues that have contributed to the controversy over Standard 405 and that may help explain why considerable efforts to revise the standard have, to date, failed.

Professor Peter Joy, a current member of the ABA Standards Review Committee, provides a thorough history since 2008 of Standard 405, describing in particular why it differentiates among tenure-track, clinical, and legal writing faculty, and documenting some of the disagreements among representatives of that group. Although Joy believes the standard needs revision, he is pessimistic about the prospects, in part because of significant opposition to the ABA's use of its accreditation process to set any faculty terms of employment, including tenure.

Dean Emeritus Donald Polden and Dean Emeritus Joseph Tomain, who were, respectively, the chair and secretary of the ABA Standards Review Committee from 2008 to 2011, add their perspectives about the history of Standard 405, and they add a particular focus on, and recommendations for, the institutional roles and responsibilities of the ABA and the AALS. Like Joy, they believe that revisions to Standard 405 were derailed, in part, by concern that the ABA would remove any standards governing terms of employment. They also suggest that increased attention to the new standards governing assessment drew attention away from 405(c).

We are most grateful to all the authors for their contributions to this important issue. We hope that these papers will spur further dialogue, and we welcome responses and additional article submissions.

Kate O'Neill

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