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The Honorable Simon Oliver, Jr., Council Chairperson
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Comment on Standard 405

I write to urge the members of the ABA not to abandon the requirement of tenure for ABA accreditation of law schools. My comments are based on personal experience as one who teaches in two highly-charged fields, environmental law and LGBT matters. My comments are also informed by the approach of the Society of American Law Teachers (SALT) in its comments on tenure dated September 27, 2013; I was part of the committee that drafted them. And I also seek here to respond to the portion of the comment period at the January 2014 annual meeting of the Association of American Law Schools (AALS), where I observed some of the comments and conversation around the tenure issue.

These comments are my own, and do not reflect the position of my institution, Seton Hall University School of Law.

One of the recurring errors in the panel’s responses to comments at the January 2014 AALS Annual Meeting was the assumption that all professional schools have the same structure and dynamic. We were told that no other credentialing of professional schools requires tenure. But the health care professions are different. By and large they have similar goals and, while there may be societal disagreements over policy, the core of the institution itself is not based on argument and disagreement.

Law is. We deal in controversy, and what we do, in many areas, is inevitably and essentially politicized. We cannot do our jobs as teachers (I’ll use the SALT terminology “teachers”, as opposed to “professors”) without being smack in the middle of highly politicized controversies. The market does not protect us from that, even when in the judgment of the law school itself the pressure is contrary to the best interests of students. And it does not protect students from the effects of attempts to silence faculty or to steer them, carried out by others outside the law school, efforts that adversely impact students’ ability to obtain the kind of quality legal education that you seem to suppose market forces will provide. The Committee must abandon its analogy to other professions, for it is mistaken. Law is not dentistry.

At the AALS meeting, Professor Liz Schneider of Brooklyn Law School was among those whom I recognized speaking to this point. She is an eminent advocate for women’s rights, having had a great deal to do with bringing issues of battered women’s rights to visibility. Her point and that of others was precisely that we as law teachers deal in forces that will strike back in both obvious and subtle ways.

My own experience at my law school, Seton Hall, a diocesan Catholic university, actually began before I accepted their job offer. I asked a friend if she knew someone on the Seton Hall faculty I could trust who would tell me what the atmosphere was like re LGBT issues. She identified such a person, not yet tenured. I phoned, and was assured everything was fine. It was not. When I asked her years later why she had lied to me, she said, “Because you might have been a spy.”

Seton Hall University School of Law adopted an antidiscrimination statement that includes sexual orientation in the early 1990s, prompted by the AALS’s position on the matter. Whatever their personal positions, our faculty and administration have made a commitment to diversity in this regard.
Nevertheless, in practice the policy is aspirational in some respects. It is also fragile. Pressures external to the law school often put the administration in the position of brokering how faithful it can be to the promise of this goal. Thus, I find myself in the position of advocating for the policy we already have. The protection provided by tenure is a vital part of this process. For example, I had to take the initiative to arrange a series of annual amelioration events around the Solomon Amendment for example; although there was much support at all levels in the school, and although AALS policy required such events, no one else would get the process going. Over the years I have populated our library with an appropriate selection of books on various topics related to law and sexuality – it hadn’t happened earlier. Although the administration supported the formation of a student group eventually, beginning in around 2001, I’ve had to advise the students and advocate for them, during formation and subsequently, and not always successfully.

Other faculty benefit from tenure as well. One of our faculty members was in the legislature at the time of Lewis v. Harris (N.J. 2006) (requiring the state to provide equal rights and benefits for same-sex couples as for opposite-sex couples, without explicitly requiring marriage), and was a principal sponsor of New Jersey’s civil union law. The Dean is still getting letters calling for that faculty member to be fired.

I want to stress that my institution is doing the best it can on LGBT issues in light of the conflicting currents that Catholic educational institutions face at this time. One can find much the same dynamic at many law schools, secular as well as religious, historically as well as in the present.

The bottom line on this point is that, where isolated and politically disempowered and stigmatized minorities are concerned, the market alone does not always work to provide an incentive for the best education for all. Removing tenure makes vulnerable the very faculty who must advocate on behalf of these disempowered voices.

The problem is not limited to isolated, disempowered minorities. Powerful institutional actors also put pressure on law schools to curtail their educational activities. This has been the case at a number of environmental clinics, most notably Oregon, Tulane, and Maryland. The position statement of the Clinical Legal Education Association (CLEA), dated January 27, 2014, refers to more than twenty such incidents. In a sense, the situation is parallel. While environmental advocacy does not engage discrimination, it often advocates for interests that are diffuse and individually small, and therefore politically powerless as against more coordinated and powerful groups.

Now let’s turn to another topic, the function of tenure more generally in law schools. This concern is ably addressed in SALT’s comments from September 27, 2013, and here I’m just providing my gloss on SALT’s argument. Tenure allows law teachers a space from within which they can be reflective and constructively critical about the subject matter that they are studying. Law teachers should use the security of their tenured position to study, reflect on, innovate, and critique the practice and teaching of law. Scholarship and innovative teaching, as well as participation actively in advocacy via clinical

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2 See, e.g., Bruce A. Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713 (1985) (refining the process theory derived from Carolene Products footnote four in light of public choice truths about coordination of groups).
advocacy and amicus briefs and professional advisory groups and treatises, all help to improve legal practice and doctrine. Law teachers who engage in this investigation, scholarly critique, and innovative teaching also shift legal practice through the instruction of the next generation of practitioners, while they are law students, showing them how to engage in productive critique.

But questioning can be perceived as disruptive. I do not believe that the primary purpose of tenure is to protect the rebellious law professor as such – though that certainly falls within its larger function. Academic freedom is however an essential component of the process of improving the law. As SALT wrote, “Tenure in the legal academy serves . . . unique functions; it encourages study and critique of the legal profession itself and our system of justice, and allows faculty (and their students) to write, teach, and litigate both against and in support of the interests of the powerful and entrenched.”

I would like to underscore a point in SALT’s position paper that I think important and unique. If we leave tenure to the market, large, wealthy schools insulated from political pressure will best be able to supply the safe space necessary for the critical work that is the job of the law teacher. Many suspect that the current restructuring of legal education will result in national schools that are research institutions and regional and local schools that provide a vocational training. This model is unacceptable, in part because national schools have done and will continue to do an inadequate job of providing study and critique of many local and regional issues. By a similar mechanism, law schools with particular missions to serve disadvantaged groups, or with religious missions, or law schools designed with class in mind, will respond to the concerns of their constituencies in a way schools with national mission and focus often will not. Thus, it is essential to impose a tenure requirement on all law schools, rather than supposing that some lesser measure governed by the market for quality education will do the job.

In sum, the ABA should recognize that “tenure” has a longstanding, widely-shared understanding accompanied by a familiar set of social practices; that it serves important functions in securing the ability of law teachers to address controversial issues, including those of direct concern to LGBT students and other minorities which students may not be able to advocate effectively for themselves; and that tenure generally speaking assures law teachers the space and distance to engage in critical investigation and innovation, which is an essential part of updating and improving legal doctrine and practice in the interests of justice. Newfangled and not widely-understood terms and contracts, and the notion that the market will supply adequate incentives to serve the ends of tenure, are inadequate and severely mistaken. I urge the ABA to retain tenure as a requirement for law school accreditation.

Respectfully submitted,

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