

Accreditation and the AALS

The Boalt Affair

Paul D. Carrington

I write to call attention to what I perceive to be a transgression by the executive committee of the Association of American Law Schools. Although I may risk seeming to make more of the event than I intend, the episode may be symptomatic of a larger problem and thus may be of interest to readers of this journal.¹

On November 30, 1989, Jesse H. Choper, the dean of the law school at the University of California (Boalt Hall), received a letter from Betsy Levin, the executive director and vice president of the Association of American Law Schools, writing dutifully on behalf of its executive committee.² The letter advised Dean Choper that his school was “fulfilling the obligations of membership” in the association but contained the following admonition:

The Executive Committee [of the AALS] has determined, however, that certain matters should be addressed, in particular the law school’s commitment to hiring, promoting, or retaining a diverse faculty including women and members of minority groups. The Executive Committee believes that special attention is needed to improve the law school’s hiring record, ensure that procedures for reaching tenure and promotion decisions operate in a nondiscriminatory fashion, and provide a supportive environment for all junior faculty members.

This letter was not a private communication but rather a response to a report from a sabbatical inspection for accreditation purposes conducted jointly by the Association of American Law Schools with the American Bar Association. It was intended for routine circulation to the faculty, and thus inevitably to the community of students and alumni of the school, and ultimately to the media. Few readers will fail to recognize in this public communication a serious accusation. The AALS expressed for all to see its suspicion that one of its most respected members is guilty of race *and* gender discrimination.

On the face of the matter, such a suspicion must surprise those at all familiar with Boalt Hall and its history.³ Boalt is, after all, the school of Gary Trudeau’s Joanie Caucus and sits at the epicenter of the “activism” of the

Paul D. Carrington is Chadwick Professor of Law, Duke University School of Law.

1. This narrative has been privately circulated as part of a lengthy draft entitled “Law Teaching in a Time of Moral Excess.”
2. AALS president Herma Kay recused herself because she is a member of the Boalt faculty.
3. For a useful history of the school, see Sandra Epstein, *Law at Berkeley: The History of Boalt Hall* (unpublished Ph.D. thesis, University of California Law School, 1979).

Vietnam era, and of contemporary "political correctness." Indeed, the school has had women on the law faculty beginning with the appointment in 1923 of Ann Armstrong, an eminent lawyer-economist who advocated and helped draft and promote the Social Security Act. Founded by men who were active in the Progressive Party movement, Boalt's faculty has long featured outspoken opponents of racism.⁴ One of its most prominent members was denied confirmation when appointed to the California Supreme Court because of his alleged radicalism.⁵ Boalt has had minority faculty beginning with the appointment in 1954 of Sho Sato, an early champion of environmental law. With the possible exception of the other law schools of the University of California, it has the most racially diverse student body of any law school and perhaps any professional school in the world. Many of its female and minority alumni provide political leadership in California, as well as elsewhere in the United States and around the world. Berkeley students are, to say the least, famously intolerant of intolerance. The University of California, especially at Berkeley under the leadership of Chancellor I. Michael Heyman, a member of the Boalt faculty, has been notably aggressive in seeking to diversify its students and faculty.⁶ It is the same institution that successfully defended its affirmative action admissions policies in the Supreme Court of the United States.⁷

The Association of American Law Schools had to know that the consequences of an accusation of discrimination coming from an association of peer law schools would be potentially inflammatory for any member school, but especially for Boalt. It also had to know that the disincentives to the practice of racial or gender discrimination at Boalt are especially strong. What, then, would prompt such an attack by the AALS on one of its members? Surely, one would suppose, the attack must have been made only with caution, on substantial evidence strongly supporting if not compelling the expressed suspicion, and with perhaps even a bit of special care in the case of Boalt because of its vulnerability. Not so. In fact, the communication was dispatched to Dean Choper casually, without extended debate, without significant basis in any information that was before the AALS, and without any advance notice that such an action was under consideration.

I learned of the letter before it was in fact published, while I was attending the AALS annual meeting in San Francisco in early January

4. Particularly notable is David O. McGovney, professor of law from 1925 to 1947. See, e.g., D. O. McGovney, Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds Is Unconstitutional, 33 Calif. L. Rev. 5 (1945).
5. Max Radin was a professor of law from 1919 to 1948. For a biographical sketch of Radin, see William O. Douglas, Max Radin, 36 Calif. L. Rev. 163 (1948).
6. An exhibition of what many readers would regard as the university's extreme sensitivity to issues of race was published in 1990, shortly after the events here reported. See Report of the 1990 All-University Faculty Conference on Graduate Student and Faculty Affirmative Action (University of California, 1990). The publication speaks to the general ambience of the university in relation to matters of race and alleged racism. It projects a university that would be a demographic reflection of the population of the state it serves and proposes that every member of the faculty and staff should be expected to favor this goal and secure its achievement by 2005. The report is signed by the president of the university, David Pierpoint Gardner.
7. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

1990. Its existence, although officially confidential at that time, was the subject of corridor talk among several groups in attendance. Members of the executive committee were apparently the source of the information. As a former member of that committee and as a former chair of the accreditation committee with a long-standing interest in accreditation matters,⁸ and also as a recent visiting professor at Boalt, I was sufficiently interested in the matter to make a few inquiries to supplement the information that had come to me casually from other sources.⁹ I persisted in my inquiries in part because the executive committee refused to be in the least forthcoming, although some of its members were willing to discuss the event off the record. Although there was no Deep Throat, there were several somewhat informative voices to be heard. (They tended to suggest that they were not personally responsible for what happened.¹⁰)

Those familiar with the law school accreditation process would assume that the factual basis for the letter would be a matter of record. The record in such instances is generally provided in a report from a sabbatical inspection team (selected largely by the American Bar Association). A report on Boalt Hall was submitted to the AALS in June 1989; it was based on a site inspection conducted two months earlier. Such reports are

8. I first involved myself in such matters briefly in 1963, and the interest has endured. In 1971, I chaired a substantial AALS study that resulted in a broadside against uniformity and regulation in legal education: *Training for the Public Professions of the Law*, 1971 AALS Proceedings, pt. 2, reprinted in Herbert L. Packer & Thomas Ehrlich, *New Directions in Legal Education* 95 (New York, 1972). I have on several occasions appeared before the council of the ABA Section on Legal Education and Admissions to the Bar to argue against expansion of accreditation standards. In 1974, I spoke before the council against the adoption of Standard 212, which requires affirmative action in the admission of minority students. I argued that such affirmative action is much more desirable if effected by the voluntary action of law faculties, that there were already ample affirmative action initiatives, and that such a requirement would be invalid because it is beyond the legitimate reach of a system of control that is justifiable only by its contribution to the competence of the legal profession. In 1980, when asked as dean of the Duke University School of Law to file a report on my school's efforts to comply with Standard 212, I refused on the grounds that the requirement was invalid and that the only effect of such reports would be "to kill trees," because every qualified minority student in the United States could readily find a place in a law school and, in all likelihood, some financial assistance. As a member of the AALS executive committee from 1984 through 1986, I regularly opposed enlargement of accreditation requirements and advocated deregulation, even of such undebatably humane and desirable matters as access for the handicapped, a concern appropriately expressed in federal law and not, in my opinion, suitably regulated by the AALS. In particular, I have opposed library regulation aimed at elevating the status of the librarian's profession (although two members of my immediate family are librarians) and regulation aimed at elevating the status of clinical education (although I have sometimes tried to teach clinical courses). In 1984, I published in these pages a parody of professional school accreditation: Publius D. Cassius [pseud.], *Call for a Profession of Truth*, 32 J. Legal Educ. 267 (1982). In 1986, I was appointed to serve on the committee to revise the AALS membership requirements. President Prager, who appointed me, informed me that my role was to assure that a voice for minimal regulation should be heard within that committee, a role I was pleased to try to perform.
9. My first inquiry went to the chair of the accreditation committee, Judith Wegner, dean of University of North Carolina School of Law. Wegner refused to discuss the case with me and referred me to the executive committee.
10. My letters of inquiry and drafts of this account were circulated to the executive committee through 1990; each draft drew out another bit of information about what had happened, usually offered in confidence.

traditionally used to identify lapses in a university administration's support of its law school. The report enables the two accrediting associations to identify those universities that should be pressed to be kinder and more generous to law faculties. To assure that the inspection report appropriately reflects the interests of the inspected school, a draft of the report has, until very recently, been presented to the dean, as the representative of the faculty, for comment before it is submitted to any committee of either association.

Accreditation inspection reports are confidential for several reasons. First, most of the information contained in such reports is provided by the dean of the accredited school to the accrediting associations on a confidential basis. Second, the inspection team always asks the dean, What bad things would you like the association to say about your school in order to compel your university to give you the help you want? Obviously, the answer to that question must be kept confidential. Third, adverse comments about a school by an inspection team could, if publicized, do disproportionate harm to the institution's relations with its students and alumni. Candor is more likely in a report that will not be published. Fourth, inspection teams do occasionally receive criticisms of the inspected school from students or dissident faculty members that may bear reporting to the accrediting associations. Although confidentiality is also useful to protect such communications, the inspection team rarely receives significant negative information, because students and faculty usually want the inspection team to think well of their school. Thus, a sabbatical inspection may be an ineffective tool for gathering information that anyone may have a reason to conceal.

Nevertheless, the joint inspection team that visited Boalt was an unusually distinguished team. Its chair, appointed by the American Bar Association, was Roger C. Cramton, former dean at Cornell Law School and a former AALS president. Others included Douglass Boshkoff of Indiana University School of Law (a former dean), Allen E. Brennecke of Marshalltown, Iowa (a practicing lawyer), Richard H. Surles, Jr., of the University of Illinois College of Law (law library director), and Roy T. Stuckey of the University of South Carolina School of Law (clinical law professor). The AALS representative on the team was Robert A. Gorman of the University of Pennsylvania Law School, who was soon to become president-elect of the association.

The team was asked to investigate the "diversity" of the Boalt faculty. Their 35-page report disclosed that in 1989 the Boalt law faculty was fairly diverse, with 8 women and 4 minorities out of 55 members. The senior faculty had, the report observed, been rigorous in the application of its tenure standards to male and female candidates. Several male candidates had withdrawn in the face of predicted denials, and the faculty had denied tenure to two female candidates, who contested the decisions. In both cases that involved women, there were recriminations, as one would almost expect given the character and traditions of the Boalt community. In one case, it was noted, the university awarded tenure over the divided vote of the faculty, and the faculty thereafter voted unanimously to elevate their

colleague to full rank. An appeal in the second case was pending at the time of the inspection. The report did not address the particulars of either case.

The failure of the sabbatical inspection team to review the particulars of the two tenure decisions was in keeping with the usual practice of such inspections, which are not designed or staffed to conduct adversary proceedings to determine accountability for unlawful or reprehensible conduct such as race or gender discrimination. In the past, AALS has generally directed grievances about individual tenure decisions to its committee on academic freedom and tenure, which is organized and staffed to adjudicate disputes.¹¹ Although it is possible that some inspection teams have on occasion conducted inquiries into specific tenure questions, I do not recall any such instance in the six years that I read all the reports.

I do not intend in this brief article to raise issues about the merits of the two tenure cases at Boalt. The disputes are irrelevant to an evaluation of the performance of the executive committee because the committee had no usable knowledge about the merits of either case at the time it issued its accusatory letter. The inspection team's report, which constituted all the information before the committee at the time of its action, "concluded that a pattern or policy of gender discrimination has not and does not characterize the School's appointment and promotion decisions."¹² There was indeed very little in the document to support any other conclusion. Nor was there anything in the AALS membership requirements that would require Boalt as a member school to embrace any personnel policy except one that did not discriminate on the basis of race, national origin, religion, or gender. Boalt had no obligation as a member school to hire and retain a "diverse" faculty.¹³

Not only did the inspection report present no evidence of discrimination, it also observed that the university had been more intrusive in law school personnel matters than is customary or perhaps desirable. A reader could derive from this observation in the report a possible concern that the university's action in the first tenure dispute had been an instance of a university administrator's relieving political pressure on himself by imposing it on the law school and thereby intruding on the principle of faculty governance.¹⁴ I emphasize that the inspection report made no explicit allegation of misconduct by the university administration, nor do I now make one. An explanation of the university's action that is consistent with the AALS membership requirements is that Boalt's tenure standard was simply too high, an estimation with which I tend to agree.¹⁵ Although the

11. See Association of American Law Schools, Association Handbook 31 (1991) (ECR 6.1) [hereinafter Handbook].
12. Site evaluation report at 9.
13. Bylaw 6-4 committed member schools to equality of opportunity. This bylaw was amended in January 1990 to require "diversity." Handbook, *supra* note 11, at 21.
14. The principle stipulated in the AALS membership requirements: "[a] member school shall vest in the faculty primary responsibility for determining institutional policy," and "[t]he faculty shall exercise substantial control over decanal and faculty appointments or changes in faculty status, such as promotions, tenure designations, and renewal or termination of term appointments." *Id.* at 22 (Bylaws 6-6(a) & (c)).
15. I have made no investigation into the practices of the Boalt faculty beyond the account

sabbatical inspection report provided a firm basis for calling for more information to determine whether the university's intervention was justifiable, the AALS did not inquire further.

Dean Choper reviewed a draft of the sabbatical inspection report that contained the favorable finding before the report was submitted to the ABA and AALS. The report was then presented to the AALS accreditation committee. That committee, chaired by Judith Wegner of the University of North Carolina, reviewed the report on Boalt at its regular semiannual two-day meeting, along with perhaps a dozen similar reports. Most of the reports were much longer, and several revealed genuinely troublesome problems of the conventional sort (involving inadequate university support). Additional troublesome items lingered on the agenda from previous meetings. For each agenda item, the accreditation committee had a summary provided by the AALS representative on the inspection team; in the Boalt case, by Robert Gorman. Given the notable distinction of Boalt and the favorable tenor of the inspection report, it is likely that the accreditation committee devoted little time to a study of the Boalt report. Although reliable sources indicate that the accreditation committee recommended that Boalt's membership should be continued without comment on the issue of gender discrimination, the facts remain uncertain.¹⁶

The accreditation committee made its report to the executive committee at a meeting in Phoenix in November 1989. The report included drafts of letters to each of the deans of recently inspected member schools. The letter Dean Choper received was the outcome of the executive committee's consideration of the accreditation committee report and reflected any changes that the executive committee may have adopted. Members of the executive committee at the Phoenix meeting who were present at the vote to send the letter to Choper were Guido Calabresi, dean of Yale Law School; Richard Huber of Boston College Law School (and 1988 AALS president); Ellen Jordan of University of Georgia School of Law; Emma Jordan of Georgetown University Law Center (and 1992 AALS president); Thomas Morgan of George Washington University National Law Center (and 1990 AALS president); Kathleen Price of University of Minnesota Law School (now a law librarian, Library of Congress); and Kristine Strachan, dean of University of San Diego School of Law. Mark Yudof, dean of University of Texas School of Law, was absent; Herma Kay of University of California at Berkeley School of Law—Boalt Hall (and 1989 AALS president) did not vote, and it is possible that others did not as well. It appears that the admonition sent to Boalt was largely if not entirely at the initiative of the executive committee, not that of the accreditation committee, which in my own six years of recent experience had always initiated any admonitions.

provided in the report not only because the AALS did not make one but also because I have no right to conduct such an inquiry.

16. In response to my account, Levin now reports that the executive committee was told that the accreditation committee had been "troubled" by the Boalt report. Betsy Levin, *The AALS Accreditation Process and Berkeley*, 41 *J. Legal Educ.* 373, 383 (1991).

In the light of the inspection report that Dean Choper had reviewed earlier, the letter from the AALS executive director came as a very unpleasant surprise. Granted, between the time of the report and the committee's meeting, additional pertinent developments had arisen, but none of these were in the record before the committee, nor had any AALS official ever discussed them with Dean Choper or anyone knowledgeable about Boalt. Neither the executive nor the accreditation committee had sought to supplement the inspection team's report by requesting additional information from the school. Although there may have been some dissatisfaction with the inspection report (perhaps based on the gender of its authors) or a felt need for updated information about the second tenure dispute, neither committee asked the inspection team to conduct further inquiry, even though there is substantial precedent for special additional inspections.

Indeed, at the time of its action in Phoenix, the only information about Boalt before the executive committee was, I have been told, Gorman's one-page summary of the inspection report. Because no action adverse to Boalt had been put on the agenda by the accreditation committee, there probably was not even a copy of the full 35-page report itself in Phoenix at the time of the meeting. Indeed, I have been informed that the members of the executive committee did not read the full report on Boalt until they decided in January not to reconsider their uninformed action.¹⁷

Although I have learned from more than one member of the executive committee present at Phoenix that there was vocal disagreement, the recorded vote was apparently uncontested. The minutes are secret. Despite the circulation within the executive committee of my extended correspondence with Thomas Morgan (1990 AALS president) protesting the situation and challenging the committee to explain its action,¹⁸ not one member of the executive committee has been willing publicly to explain his or her vote, or to justify the veil of secrecy that has since been thrown over the committee's deliberations.

Upon receiving the letter of admonition, Dean Choper urged the executive committee to attend to the harm that would be caused by publishing the letter and asked AALS to withdraw it, at least until he might have an opportunity to present the views of the Boalt faculty to the executive committee or to anyone responsible for a decision he regarded as factually unfounded. Levin withdrew the letter temporarily. After further private deliberation within AALS, however, the letter was reinstated on January 12, 1990, with the additional information, apparently intended to comfort Boalt, that Boalt had not been singled out for such adverse comment but was merely one among a number of schools so chastised.

As required, the dean made the letter available to the Boalt faculty. He also circulated the more favorable confidential inspection report among his

17. In response to my account, Levin states that the report was actually available in Phoenix.

18. Letters from Carrington to Levin (Jan. 25, 1990), from Morgan to Carrington (Jan. 29, 1990), from Carrington to Morgan (Feb. 5, 1990), from Morgan to Carrington (Feb. 16, 1990), from Carrington to Morgan (Feb. 27, 1990), from Morgan to Carrington (March 5, 1990).

colleagues. As predicted, all the material found its way promptly into the hands of students and the press. The letter had the incendiary effect that Choper had foretold—an outcome that must have been fully expected by its authors. Among the less predictable consequences was a letter from a Boalt student organization to two persons (one male, one female) who had been offered positions on the Boalt faculty, asking them to decline the offers so that the positions could be reserved for minority candidates. There has been little peace at Boalt in the months following. Several sit-ins in Choper's office—efforts to compel “diversity” appointments—were accompanied by acts of vandalism. The dean announced his resignation, effective at the end of the 1991–92 academic year.¹⁹

This affair is not an isolated event. Rather, it is an example of at least two observable trends. One is the repressive moral zeal—now generally described as “political correctness”²⁰—that is spreading throughout higher education in the United States. The Boalt affair can be viewed as perhaps its first (but not the last) notable manifestation in the venue of the Association of American Law Schools. A second trend is the increasing involvement of the AALS executive committee in specific matters of accreditation. Not many years ago, the committee devoted much of its limited attention span to drafting letters such as that received by Dean Choper. From about 1980 to 1987, an effort was made to extricate the executive committee from this task and to vest the accreditation committee with greater responsibility for its decisions. This course was pursued by those who believed that accreditation should be left primarily to the ABA and that the AALS should focus on protecting member schools from the sometimes overbearing dictates of ABA representatives and committees. The one-page summary of the inspection report was created as a means of pursuing this course. At least some of those who voted for the device supposed that it would serve to caution the executive committee against routine excessive involvement in the details of member schools' affairs. Since 1987, this purpose has apparently been subverted. At its November 1990 meeting, the executive committee again reversed the accreditation committee's recommendation on two matters, both apparently on the basis of knowledge limited to the one-page summaries. Both instances involved the denial of applications for membership that had the support of the accreditation committee.

It is possible that the two trends are related, that the current inability of the executive committee to resist the impulse to regulate faculty appointments and other routine matters at member schools is the product of the

19. I do not mean to imply that the AALS drove Choper from his office; his time was in any event nigh. See Paul D. Carrington, *Afterword: Why Deans Quit*, 1987 *Duke L.J.* 342.

20. I am not prepared at this time to express my views on this trend. For elaboration, see, e.g., the ten articles on “Race on Campus” in *The New Republic*, Feb. 18, 1991, at 18–47, or Dinesh D'Souza, *Illiberal Education* (New York, 1991). I do not associate myself with all the views set forth in either source but am willing to associate myself with the main thrust of a recent editorial in *The Economist*, which decries the intolerance oddly characteristic of contemporary Americans. See *From There to Intolerance*, *Economist* July 20–26, 1991, at 15–16 (especially the observation that “Americans are being permissive about themselves and puritanical about others”).

secular Calvinism now apparently infecting much academic discourse. Perhaps this disorder is what prompts the governing body of the AALS to impose its presumably uplifted morality on its less elevated constituent groups. Whether either or both of these causes—or others unnamed—are the source of the Boalt affair is a question the author leaves to the reader.

