



Access to Justice: Our Faculty Colleagues and Students Stepping Up in a Big Way

By Paul Marcus, AALS President and Haynes Professor of Law, William & Mary Law School

When I became AALS President during the first week of January at our Annual Meeting in San Francisco, I spoke of the need to ensure access to justice in the U.S. and the role law schools can and do play in that effort. I knew then about many wonderful programs offered by our member schools, and I mentioned a number of them by name. I also knew then about remarkable collective efforts being put forth across the nation: as the recent AALS survey made clear (*see Winter 2017 issue*), more than \$50 million worth of *pro bono* legal service was provided in 2016, with thousands of law students participating in a wide variety of projects and volunteering millions of hours to support the public good.

Little did I know then, however, that we would soon be put to an extreme test. Thousands of individuals were affected by the executive order issued in late January restricting travel to the U.S. from seven predominantly Muslim nations. Lawyers and students responded in record time to assist those who were struggling to receive vital legal aid and much-needed information. Tremendous efforts by lawyers, law students, and law teachers resulted in something we rarely encounter: genuine gratitude for the work of our profession.

Signs were seen and chants were heard at airports throughout the country: “Let the lawyers in,” “let them see their lawyers,” “thank you, lawyers.” Lawyers, yes—and law students and faculty members, as well. The actions of people in the legal education community were nothing short of extraordinary. Let me outline for you just a few of the many we saw develop in a very short period of time.

Schools immediately organized programs to educate people on the reach of the executive order and its impact on them. Close to 200 UCLA law students joined with lawyers and immigration advocates to spread information about the order in Southern California. Immigration law forum programs at Western New England University, Arizona State University, and Washington University laid out the manner in which communities in those parts of the nation might be impacted by the new travel and immigration restrictions. At American University, the law school had a “rapid response teach-in” where faculty members explained the effects of the ban and



AALS President
Paul Marcus

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Nominations Sought for AALS President-Elect, Executive Committee Positions

The 2018 Nominating Committee would very much appreciate your help in identifying strong candidates for President-Elect of the Association and for two open positions on the Executive Committee (three-year terms).

To be eligible, a person must have a faculty appointment at an AALS member school. The committee will formally recommend candidates for these positions to the House of Representatives at the 2018 Annual Meeting in San Diego.

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Please send suggestions for persons to be considered, along with supporting comments, to AALS Executive Director Judy Areen at 2018ECNominations@aals.org by June 1, 2017. You may also mail recommendations to 1614 20th Street, NW, Washington, DC 20009.

2017 AALS President Paul Marcus has appointed the following individuals to the Nominating Committee for 2018 Officers and Members of the Executive Committee:

- Gail Agrawal, University of Iowa College of Law
- Blake D. Morant, George Washington University Law School, Chair
- Larry Ponoroff, Michigan State University College of Law
- Daniel Rodriguez, Northwestern University Pritzker School of Law, 2017 Chair
- Melanie Wilson, University of Tennessee College of Law



AALS Executive Committee member Camille A. Nelson with AALS President-Elect Wendy Collins Perdue at the 2017 AALS Annual Meeting

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discussed potential legal challenges. Students from the University of California at Davis communicated with family members in the U.S. who in turn contacted loved ones who were caught up in the limitations.

From the University of Colorado to Catholic University, numerous schools had faculty and students go immediately to international airports to explain the executive order and offer aid. Washburn University students and faculty created a community education project with the Topeka Public Schools to respond to the fear and uncertainty created by the executive order.

Other law schools moved rapidly to engage in litigation challenging the executive order. At Brigham Young and the University of Utah, law professors joined a court brief in the U.S. Court of Appeals for the 9th Circuit. Students and professors

from Harvard filed papers opposing the government's motion to stay a temporary restraining order issued by the U.S. District Court for the Western District of Washington. Yale students and faculty were successful in persuading a federal judge in Brooklyn to issue a nationwide temporary stay blocking the government from deporting people pursuant to the executive order.

Legal clinics at NYU, the University of Iowa, Albany, and the George Washington University were among the large number of law schools that offered legal advice to individuals regarding their status and the options open to them under the executive order.

To our public-spirited faculty colleagues and our students, for all that you do for the public good and especially for what you did in response to serious concerns of due process and discrimination, I thank you. You have made us all proud.



Seeking Recommendations for AALS Committee Appointments

Thoughtful and effective volunteers are a vital element in the work of AALS, much of which is accomplished by a diverse group of committees organized around a wide range of issues in legal education. AALS President-Elect Wendy Perdue will soon begin to choose her committee appointments for 2018, and we seek your assistance in identifying individuals for consideration.

It is the aim of AALS to build committees that reflect the participation of newer, as well as seasoned, members of the academy. All appointments will begin January 2018; some will be three-year terms and others will be one-year. We invite recommendations for members of any of the committees with openings, which can be viewed at www.aals.org/about/committees.

You may recommend any full-time faculty or staff member at an AALS member school, including yourself. Please include your insights into the suggested person's strengths in the context of the committee service you propose.

Recommendations should be sent to Judith Areen, AALS Executive Director, at 18committees@aals.org with the committee name in the subject line. Please submit all suggestions by June 23, 2017.



BIOGRAPHY UPDATES AVAILABLE FOR DIRECTORY OF LAW TEACHERS

Copies of the *2016-2017 AALS Directory of Law Teachers* have now reached AALS member schools and law libraries. While the directory is printed once a year, tenured, tenure-track, long-term contract, and emeritus faculty are welcome to update their biographies at any time throughout the year at <https://dlt.aals.org/>.

AALS launched an online search function for the directory last fall. In addition to searching by name and school, the new search function can sort faculty members by subjects taught. Users may also sub-search criteria including currently teaching, years teaching, and seminar offering, among others. It also allows users to cross-search for multiple faculty and multiple subject areas at the same time. Participants in the directory may adjust their privacy settings so their listing reflects the amount of information they would like to be available online.

Spotlight on Sections: Section on State and Local Government Law

By Barbra Elenbaas

The AALS Section on State and Local Government Law promotes the communication of ideas, interests, and activities among members of the section and makes recommendations to AALS on matters concerning state and local government law.

We met with the leadership of the section in January 2017.

What can you tell us about the membership of the Section on State and Local Government Law and the work they do?

Sara Bronin: Our members are law professors who teach and write in the areas of state and local government law, some of whom have had careers in the public sector before teaching. In our section, we are lucky to have leading experts in taxation, public finance, the administrative state, and federalism, among other topics. Our section comes from a variety of political and geographic backgrounds. Some of our members work in the rural context, some in the urban context.

Matthew Parlow: We have some people who put state and local government law, both as a scholarly discipline and a practice area, on the map—people like Gerald Frug and Richard Briffault—who brought this area to prominence. It's a neat thing, as a section, to have some of the scholarly founders of our area as active members of the group.

What can you tell me about your section's program at the 2017 Annual Meeting?

SB: The program was intended to reflect the diversity of views on a topic that is very lively in the public eye right now, which is legalization of marijuana. The title was "Marijuana Law 2017: Federalism, Criminal Justice, and Health Care." We had two law professors and a law professor moderator. We also took special care to invite non-academics who are actively working in this area: the Executive Director of the National Cannabis Bar Association and a senior director of the Drug Policy Alliance working in Colorado, which is very much a ground zero for these issues. The goal of the panel was to highlight the complex interplay of local, state, and federal laws and their impact on how users of marijuana interact with the health care system and the criminal justice system.

MP: We had multiple different angles of this issue being discussed at the same time. We had a good combination of academics and people working on the front lines in California and Colorado.

What are the important conversations happening right now in legal education regarding state and local government law?

MP: One thing that is on a lot of scholarly minds is the sanctuary city and what, if anything, the new administration may do with regard to them. More broadly: the city in the age of Trump. We don't know what the new administration is going to mean for a lot of cities—not just sanctuary cities—on a variety of levels. There is curiosity about how this will play out and how legal and policy issues will arise as conflict does or does not exist between cities and the new administration.

SB: Some of the most important conversations involve how local and state governments can continue to meet their own goals in light of a changing federal administration.

Ngai Pindell: There is also conversation about federal intervention and criminal law enforcement. That's either a power of the purse issue—we will or will not give you more money for law enforcement



Matthew J. Parlow, Chair, Chapman University Dale E. Fowler School of Law

Photo courtesy of Chapman University Dale E. Fowler School of Law



Ngai Pindell, Chair-Elect, University of Nevada, Las Vegas, William S. Boyd School of Law

Photo courtesy of University of Nevada, Las Vegas, William S. Boyd School of Law



Sara Bronin, Immediate Past Chair, University of Connecticut School of Law

Photo courtesy of University of Connecticut School of Law

in your city—or it potentially impacts federal intervention in areas that have not been areas of intervention in the past. But it's hard to know when these, or any, changes in policy might come to pass.

Cities are especially interesting right now. One relationship is between the city and the state, and another relationship is between the city and the federal government. Those two relationships have always been fluid; they look like they'll go through another examination and perhaps change during the new administration.

As there has been talk about giving rights back to the states, how has the conversation around state and local government law changed in response to the new administration (or how do you anticipate it will change)?

SB: I think we'll have a lot of new cases dealing with these issues. We've had eight years of one administration; cities have gotten used to doing things a certain way. Now the new administration will clearly be reconfiguring some preexisting programs and trying to take some autonomy away from local governments. I think we'll see more litigation that will impact what we say in the classroom. It won't affect the fundamentals and the framework—at least, we hope it won't. That would be a pretty radical shift.

MP: One thing that may be highlighted by this, particularly if the federal government starts to push more legal and policy authority to the states, is the tension between certain cities and their respective state governments. We might also see, if states are empowered under the new administration, more of an attempt to erode home rule. States may not be the “laboratories of democracy” that Justice Brandeis once envisioned. Cities have almost supplanted states in flexing their policy muscles and trying things out. If there's a conflict between a bigger city and its state government, I think we could see more preemption from the state government to thwart cities' experimentation.



Section on State and Local Government Law panel at the 2017 AALS Annual Meeting

Much discussion across programs at the Annual Meeting centered around battles to be fought in the courts. How do you see that affecting state and local government law?

MP: It is hard to predict. It depends on where and how the conflicts occur. You could see some states like California trying to protect its cities. That state and most of its cities are probably on the same page with their policy preferences. Other states and their big cities might not be. Those cities may not get the same kind of protection from their states. Certain states might try to pass legislation to protect cities so the federal government must come after the state as well, whereas others might work in concert to try to thwart local experimentation. It's hard to say how it will play out. I think it's impossible to predict until they figure out where the conflict is and what each side is willing to do to try to resolve that conflict, if at all.

Have you or will you change the way you teach or study state and local government law based on these developments?

MP: It's hard to say until we see whether these new cases pose some new and novel challenges or they are just preemption

issues. I think it shows that state and local government law is an exciting area, especially as we've seen innovation on the local level for the last 20 to 25 years. I think that will continue. Political rhetoric has suggested that there are many cities and even states that are willing to try to make the case, in the political arena and in court, to protect what they see as their interests and powers to legislate for their constituents.

NP: I will likely focus on what is more static and what is more dynamic in these conversations. There are statutes that establish and set parameters for the local exercise of power. That's the more static piece. We also live in local communities and we have state identities, and that's constantly shifting and changing how we think of the laws that govern that space. That's the more dynamic topic. Certainly, a new presidential administration reorients peoples' thinking about their own identity as well as the identities of their community and state. I'll be interested in looking at how shifting politics and shifting identities affect how law is made, enforced, and interpreted.

How do your section members interact and collaborate outside of the AALS Annual Meeting?

MP: There are a few ways: we have a section member, Joel Mintz, who has been doing a section newsletter for quite a while. Our section also started a State and Local Government Law Works-in-Progress conference that rotates among different law schools each year. Section members come together to workshop their latest scholarship. We recently had our fifth conference in Houston.

There are, of course, any number of informal ways that our members connect with each other.

SB: Joel uses the newsletter to highlight new scholarship from section members. There's always a letter from the [section] chair, and he'll usually put something in about the Annual Meeting program and the works-in-progress conference. It's nice to have a record of what happens in a given year.

“We don't know exactly what the future is going to hold, but we expect it will have some robust legal and policy issues to discuss.”

– Matthew J. Parlow

NP: The work of the section also intersects with other AALS and academic units. For example, many of us who teach and write in state and local government law also teach and write in property law which offers additional opportunities for conversation and collaboration.

How does your section support the scholarship of your members?

MP: Letting each other know, through the section's newsletter for example, is one way. The works-in-progress conference is another avenue that has been a good opportunity to share scholarship and grow. The majority of attendees are members of the section.

There have usually been around 20 people in attendance at the works in progress conference. We advertise it to our members and on law professor blogs. Someone writing a piece in local government law, even if it's not their primary area, is welcome to come.

Many of the scholars who first brought your field to prominence are still active within your section. How has the study of state and local government changed since you've been teaching it?

MP: We have more textbooks than we did before, which is an indication of the expansion. Twenty or so years ago, people were mostly putting together their own materials. The field has evolved both in its understanding and its purview. There are so many ways one can look at state and local government law, as it touches so many areas of law; it shows the versatility of the field. There is so much one could cover. It comes down to what resonates with a specific professor.

How do you choose the lens in your teaching when you have so many available to you?

MP: I like to make the material relevant to what students are seeing around the country, and of course there are foundational things you want them to learn. I have approached it by thinking about what the frontline issues are for cities and states, and delving into those. Because it is such a robust area, you see different things popping up all the time. Legalization of marijuana is one example, and even that has myriad issues related to it: everything from federal state preemption, to land use issues, to different regulations that govern growing and distribution. There are many ways you can tackle even that one example issue.

NP: There are many different points of entry to state and local government law, and people can then explore the field through that experience. I came to the field from community and economic

development law. I was interested in public and private partnerships, local funding opportunities, and local grassroots organizing, among other areas. A number of state administrative agencies work in that space, and one way to approach state and local government law is to study how they all interact. That's one of the many lenses for state and local government law.

What is your vision for the section, this year and in the years to come? What new initiatives, project-based or ongoing, would you like to see as part of the section?

SB: This section will continue to convene scholars on the pressing issues we'll be facing in the coming years about the authority of state and local governments in an era of changing federal administration. I think that's going to be a very fruitful area for scholarship and expect that is what the section will be focusing on. We are fortunate that our section embraces collegiality and collaboration, because these discussions will raise some challenging questions.

MP: I think there will be a burgeoning number of issues that we will all want to gather and discuss, write about, and give each other feedback on. We look forward to facilitating those conversations on a national scale through AALS. We hope to continue bringing in practitioners from the field, as well. State and local government law is a very practical area in terms of where people's lives intersect with law and policy. Those are important conversations to have as we try to produce impactful scholarship.

We want to be the forum to facilitate discussions during what may be a very interesting time for state and local government law. We don't know exactly what the future is going to hold, but we expect it will have some robust legal and policy issues to discuss. We are looking forward to doing that as a section.



Spotlight on Sections: Section on Election Law

By Barbra Elenbaas

The Section on Election Law promotes the communication of ideas, interests, and activities among members and makes recommendations to the Association on matters of interest in the teaching and improvement of the law relating to election law, voting rights, campaign finance, and related topics.

We met with the leadership of the section in January 2017.

What can you tell us about the membership of the Section on Election Law and the work that they do?

Franita Tolson: The membership is inclusive. Election law is a broad topic that encompasses a number of disciplines: campaign finance, voting rights, redistricting, the Voting Rights Act, *et cetera*. Mostly legal scholars come to the Annual Meeting, but we also attract people who have different training because politics implicates so many different substantive areas as well. As we learned in the most recent election, elections matter—people are interested in hearing and learning about the implications of the rules that govern our electoral process and how they affect policy outcomes. Because of that, we have a wide draw. We will get political scientists, historians, and law professors who are in the field, but also some who do not work in election law. We also have people who are just interested in the topic because of its far-reaching implications.

We have a diversity of scholars all under the broad umbrella of election law. I think that makes for good conversations and good programming.

Michael Pitts: We also have members who are interested in constitutional law issues. There is a huge intersection between election law and constitutional law particularly, for example, with the Equal Protection Clause.

Ciara Torres-Spelliscy: I tell my students that when the Supreme Court has an election law case on their docket, every American citizen is in that courtroom whether they know it or not. Anyone who happens to be interested in the future of American democracy should be interested in us.

Tell us about your program at the 2017 Annual Meeting—“Lessons from the 2016 Elections (and Implications for the Future)”

MP: It was an enormously wide-ranging discussion about the future of the election law field and the larger political dynamic that currently exists in the United States and globally.

Our program was updated multiple times in the lead-up to the Annual Meeting. Many things that happened in the primaries seemed to get washed away by events that occurred in the second half of the year. Much of the discussion was about things that we didn't even think would be an issue when we first submitted the program.

FT: Things were so crazy that I don't know if we talked about the primaries at all.

MP: I don't think we did.

FT: We had a conversation that I just didn't expect to be having. I think people were attempting to take a step back and not be too alarmist. We re-worked the panel description a few times, given everything that happened in the six months between June 2016 and January 2017. It is a very interesting time to be doing this kind of work because election law has been a focal point for this president. For example, the 3 to 5 million people he claims voted illegally is something that he repeated several times in late-January. I think, by virtue of the fact that he is keeping attention on voter fraud, we will stay busy.



Franita Tolson, Chair, Florida State University College of Law

Photo courtesy of Florida State University College of Law



Ciara Torres-Spelliscy, Chair-Elect, Stetson University College of Law

Photo courtesy of Stetson University College of Law



Michael J. Pitts, Immediate Past Chair, Indiana University Robert H. McKinney School of Law

Photo courtesy of Indiana University Robert H. McKinney School of Law

In terms of the national conversation around election law, how have you seen that change in response to the current administration? Looking ahead, how do you anticipate it will change?

FT: Prior to this election, people would assert that voter fraud existed but I don't think anyone in the legal academy took such claims seriously. It was understood among legal scholars that there was very little evidence of voter fraud. I think now we are entering a situation where claims of voter fraud may push more states to adopt restrictive legislation and that will force scholars to confront this issue on a larger scale moving forward.

The section must engage the world as it currently exists. It is no longer enough to say that there is no such thing as voter fraud. We have to think about this from a different perspective because the President is pushing the narrative that he would have won the popular vote if not for illegal votes. Because this has become part of the national conversation, the section must respond.

MP: The conversation about fraudulent voting is shifting from a narrative about Democratic machines in big cities supposedly using in-person voter fraud as a means for winning elections to a conversation that now fuses voter fraud with the issue of illegal immigration. That fusion was always there in the background, but it has, in my opinion, been ratcheted up in a very big way by President Trump.

CTS: It is a teachable moment for our students. They hear an unsubstantiated claim by the president, and I think all of us [on the call] are assuming that a real investigation of the actual election would find that somewhere, some single person voted twice. But it would be an asymptote approaching zero, which is the way it has always been. What's most likely is that any investigation will not show what he thinks it will show. That is a teachable moment.

I haven't seen this level of interest in the mechanisms of democracy since I was a student and *Bush v. Gore* was happening. I see my own students deeply interested in how American elections function, including how the Electoral College determines who ultimately wins the White House, which is easy to gloss over if you hold the mistaken belief that the presidency is a national plebiscite—that's not true. And I have students who are deeply worried about voter suppression, restrictive voter ID laws, felony disenfranchisement, and gerrymandering. I get very detailed questions about reforms as well, whether it's about the national popular vote movement, automatic voter registration, or campaign finance reforms like public financing.

What was it like to be teaching election law in the classroom during this election cycle?

CTS: It makes for a lot of fascinating conversations, especially for the international students witnessing an election for the first time. They do not understand why we only have a two-party system. Most of my international students are used to multiple systems in a parliamentary regime. They also don't understand blind loyalty to party, which they see manifesting itself in the American context. They don't understand why we have the Electoral College and why we don't already have the national popular vote.

What do you think has yet to play out? How do you think you will need to change the way you teach?

MP: What may be just as important down the line is the Supreme Court. Cases in front of the Supreme Court right now involve redistricting and racial gerrymandering. There are cases working their way up through the courts involving partisan gerrymandering. These may be significant developments for what's heading down the line in 2020, the next redistricting cycle.

If we think back to 2010, focusing on redistricting seems to have helped the Republican party. I think the Democratic party is starting to wake up to that. The legal rules surrounding redistricting will shape how the districting plans in the states look.

CTS: And in terms of the Supreme Court, if you get someone whose beliefs on campaign finance are similar to those of Justice Scalia, then you are likely to see more deregulation of the rules that govern money and politics as well.

“Anyone who happens to be interested in the future of American democracy should be interested in us.”

– Ciara Torres-Spelliscy

How has the recent election and the unpredictability of the new administration affected your ability to do scholarship?

FT: I don't think it affects the bottom line. Scholars have different approaches in how they write their scholarship. Personally, I just try to write and not worry about the politics surrounding my writing. I try to be objective. In my scholarship, I advocate for more people to have access to the ballot in a way that I believe is consistent with the constitutional text and history. Given that, it doesn't matter who the president is relative to how I write, but this administration has seemed willing to be more aggressive in limiting access to the ballot. So of course, as a person who believes [voting rights] are important and whose scholarship reflects that, it makes me want to write more. If anything, this is motivation.

CTS: This is a time when election law scholars have a voice in the media. We get called by the fact checkers, and that is a great privilege. But it is also takes time. I think you have to be able to walk and chew gum if you are teaching election law in the next couple of years.

MP: The greatest impact on my scholarship might be on the types of proposals I might espouse to try to fix problems. I will likely try to propose ideas that might get some traction with moderates, but also aim proposals at states and local governments as much as the federal government. Election law scholars have a tendency to focus on federal remedies, but the best place for new ideas may be state legislatures, state courts, and local bodies.

CTS: Some of the movement in reforming money in politics is happening through local initiatives like innovation in public financing in Seattle and ethics reform in Tallahassee (the city itself, not the state of Florida, which has a way to go when it comes to election reform).

How do your section members interact and collaborate outside of the AALS Annual Meeting?

FT: There are several conferences throughout the year that Election Law members attend. For example, here at Florida State we had a conference last February to talk about the 50th anniversary of the Voting Rights Act. It is pretty common for section members to have conferences throughout the year, and you will see a good number of those involved in the section at those conferences.

MP: For two out of our last three Annual Meetings, we have published papers that have come from our panels with the *Election Law Journal*, which is a peer-reviewed journal. Those papers come from members of the Election Law section but because of the peer review there are also interactions outside the AALS Annual Meeting relating to the publication of those pieces. Then, presumably, they are digested by our membership as well, even those who could not make the Annual Meeting and hear the presentations.



Election Law panel at the 2017 AALS Annual Meeting

How does your section support the scholarship of your members? What does your section do to recognize new scholars and/or particularly great scholarship from longtime members?

FT: We are a fairly new section, but one of the things we will start this year is a “best election law paper from a new scholar” award. We decided on this for a couple of reasons. First, so the more senior people in the field have the opportunity to know who is up and coming. They are the people who’ll write tenure letters, after all. The other reason is to give young people who are doing cutting-edge scholarship a vehicle to publicize their work. We are looking forward to using it as an opportunity to build a bridge between older generation scholars and the younger generation, and give young people a medium in which they get their ideas out there for tenure.

What improvements to law school curricula have you seen as a result of the work of your section? How have you seen it change during the time you’ve been teaching?

FT: The field actually isn’t that old. Election law as a distinctive topic didn’t gain traction until after the 2000 election. After that, there was a proliferation of textbooks. We started seeing more classes in law schools, and there arose a focus on

developing election law as its own field. I view forming our own section as part of standing on our own feet and not being considered a part of constitutional law or legislation.

CTS: Part of that follows on the litigiousness of election lawyers. Before *Bush v. Gore*, it wasn’t clear that the Supreme Court would hear a recount, especially of the presidential election. But I think once they did, Pandora’s box was open. It opened up the idea that you could litigate some issues that were previously viewed as either administrative or as non-justiciable political questions.

How do you structure your section? Do you have an executive committee and/or other internal structure, such as internal committees or working groups?

FT: We have an executive committee with seven members including secretary, treasurer, the chair-elect, and the chair. We do not have any sub-committees. It’s a very collaborative section, and we are so small that we have had no need for sub-committees. It has worked well for us.

MP: We have the maximum number of executive committee members, which I think demonstrates the interest that is out there for our section. There is no shortage of people who are willing to be a part of it.

What is your vision for the section, this year and in the years to come? What new initiatives, project-based or ongoing, would you like to see as part of the section?

FT: I want to increase the turnout at our programs. Attendance has already been quite good, especially since we were given an 8:30 a.m. slot this past meeting. We had a packed room. It shows the level of interest in things we're talking about and working on. I hope, in coming years, you will see our attendance increase especially given the interest with the current administration.

I think it would be nice, because election law is such a broad umbrella, to mix it up on the panel. We could have a good mix of experts with political scientists and law professors. I would like to see more cross- and interdisciplinary cooperation with programming for the section.

MP: At some point, I would like to see the section focus more on teaching election law. How can we be better at teaching election law? How does election law fit into a broader law school curriculum?

CTS: Election law is both great and frustrating because it changes almost daily as courts make rulings and legislators change the rules of the game. That makes it a thrilling part of the law to teach. I hope our section can continue

to be a source of accurate information for not just the scholars in our own field but all our fellow citizens.

I am always surprised at who cares about this area. I recently had two different conversations—one was a group of veterans who were passionate about “amend[ing] the Constitution to address *Citizens United*” and the other group was environmentalists who were worried that the impact of money and politics is impeding the ability of our elected officials to accept factual science. As I said before, when the court tackles these issues, they can have an impact on the entire nation. Part of what attracted me to the field in the first place is that you can use all of your brain and some of your heart when you are practicing election law.



Workshop for New Law Teachers

On June 22–24, 2017, AALS will again offer the annual Workshop for New Law Teachers in Washington D.C. This workshop is an effective way to prepare new faculty to be top notch scholars and teachers from their first year on. The knowledge gained and shared during the workshop is beneficial for more than incoming first-year teachers. This workshop is designed to benefit any faculty hired over the past three years, if they were not able to participate in a prior workshop.

Faculty who attend the workshop will participate in interactive sessions with experienced law school teachers about preparing for teaching, becoming better scholars, and fostering student engagement. This year's program covers both teaching and scholarship and includes several sessions designed for legal research and writing faculty:

- Relevance of Scholarship to the Practice of Law
- Why Scholarship Still Matters
- Breakout Sessions on Scholarship: Designing Your Research Agenda from Scratch; Pursuing Your Research Agenda; Legal Research and Writing
- Exploring the Range of Service Opportunities
- AALS Luncheon on the Future of Legal Education
- Pathways to Tenure: Building Relationships and Distributing Your Ideas
- Breakout Sessions on Distributing Your Scholarship: Promoting Your Scholarly Profile; Promoting Your Profile Beyond Other Scholars; Legal Research and Writing Section
- Diversity and Inclusion Inside and Outside the Classroom
- Plenary Session: Learning Theory
- Teaching Techniques
- Assessment
- Navigating Tenure, Long-Term Contracts, and the Road Ahead

Please visit www.aals.org/nlt2017 for detailed schedule and registration information.



Faculty Perspectives

Faculty Perspectives is a new ongoing series in which AALS presents authored opinion articles from law faculty on a variety of issues important to legal education and the legal profession. Opinions expressed here are not necessarily the opinions of the Association of American Law Schools. If you would like to contribute to Faculty Perspectives or would like to offer a response to the opinion published here, email to James Greif, AALS Director of Communications, at jgreif@aals.org.

Validity, Competence, and the Bar Exam

By Deborah Jones Merritt, John Deaver Drinko/Baker & Hostetler Chair in Law, The Ohio State University Moritz College of Law



The bar exam is broken: it tests too much and too little. On the one hand, the exam forces applicants to memorize hundreds of black-letter rules that they will never use in practice. On the other hand, the exam licenses lawyers who don't know how to interview a client, compose an engagement letter, or negotiate with an adversary.

This flawed exam puts clients at risk. It also subjects applicants to an expensive, stressful process that does little to improve their professional competence. The mismatch between the exam and practice, finally, raises troubling questions about the exam's disproportionate racial impact. How can we defend a racial disparity if our exam does not properly track the knowledge, skills, and judgment that new lawyers use in practice?

We can't. In the language of psychometricians, our bar exam lacks "validity." We haven't shown that the exam measures the quality (minimal competence to practice law) that we want to measure. On the contrary, growing evidence suggests that our exam is invalid: the knowledge and skills tested by the exam vary too greatly from the ones clients require from their lawyers.

We cannot ignore the bar exam's invalidity any longer. Every legal educator should care about this issue, no matter how many of her students pass or fail the exam. The bar exam defines the baseline of our profession. If the exam tests the wrong things, we have a professional obligation to change it.

Minimum Competence

Establishing an exam's validity requires a clear definition of the exam's purpose. What does the bar exam attempt to measure? Bar examiners tell us that the exam assesses "minimum competence to practice law"—but what do they mean by that phrase?

In the early days, bar examiners adopted a "know it when we see it" view of minimum competence. "Everybody in this room knows what minimum competency is," one member of the National Conference of Bar Examiners (NCBE) declared in 1980. "I mean, we feel it in our bones."

A feeling "in our bones," however, is too vague to validate a professional licensing exam. Certainly, that phrase cannot justify an exam that fails non-white test-takers at a higher rate than white ones. Today's *Code of Recommended Standards for Bar Examiners*—jointly sponsored by NCBE, the ABA, and AALS—proposes a more rigorous definition. According to that Code:

The bar examination should test the ability of an applicant to identify legal issues in a statement of facts, such as may be encountered in the practice of law, to engage in a reasoned analysis of the issues, and to arrive at a logical solution by the application of fundamental legal principles, in a manner which demonstrates a thorough understanding of these principles.

The Code also specifies that "[t]he examination should not be designed primarily to test for information, memory, or experience."

This definition of minimum competence offers a useful starting point, but it falls short in two ways. First, the definition omits some of the most important skills that clients expect from a minimally competent lawyer. This is the "too little" problem. Second, although the Code warns against testing too heavily for memorization, it has not prevented that practice: current exams require vast amounts of memorization. That is the "too much" problem.

Too Little

Testing experts recommend using a job analysis to define minimum competence. NCBE sponsored this type of study in 2012, surveying more than 1,500 junior lawyers about the knowledge and skills they actually use in their work.

Those survey results support a few facets of the current bar exam. The exam, for example, tests some of the doctrinal subjects that new lawyers draw upon. Similarly, almost all new lawyers rely upon written communication, critical reading, legal reasoning, and issue spotting in their practice; these are all skills that the bar exam currently tests.

NCBE's job analysis, however, also reveals important gaps in our measure of minimum competence. New lawyers reported that knowledge of research methods was more important than knowledge of most subjects tested on the bar. Similarly, they stressed the importance of fact gathering, negotiating, and interviewing; more than 85 percent of new lawyers used each of these cognitive skills.

Faculty Perspectives

These competencies matter to clients. A lawyer who doesn't know suitable research methods won't find the regulations, legislative history, and data that will help her client. One who lacks knowledge of negotiation principles won't get the best outcome for his client. Unskilled negotiators cost their clients money, business opportunities, family relationships, and even days in jail.

A recent study by the Institute for the Advancement of the American Legal System (IAALS) illustrates how many new lawyers lack essential practice skills. A group of 123 junior lawyers completed an assessment in which they interviewed a mock client with a simple legal problem. Only 16 percent of the practicing lawyers gathered all 10 of the relevant facts from the interview. On average, they obtained just 69 percent of the necessary information. These lawyers could not have properly assisted the client, simply because they didn't know how to interview effectively.

Why doesn't our definition of minimum competence include cognitive skills that are essential for effective client representation? The answer does not lie in the fact that these skills are difficult to test on a written exam. Research, fact gathering, interviewing, and other lawyering skills are cognitive abilities. We could test for these skills by directing test-takers to outline a research plan, interview approach, or negotiation strategy based on a mock client file. Test-takers could also identify potential pitfalls, fall back positions, and ethical issues associated with their plan. These questions are no more difficult to draft and grade than classic issue-spotter essay questions.

The primary reason we don't test bar candidates on these skills is that law schools don't stress them. Schools teach some professional competencies (like appellate advocacy) quite effectively, but relegate others to a corner of the curriculum. Employers and state supreme courts have urged law schools to teach a fuller range of lawyer competencies, but most schools have resisted.

This resistance makes our licensing scheme incoherent. Law schools insist that they lack the time or resources to educate "practice ready" lawyers within three years. Yet 10 weeks after graduation, those students take an exam that purports to test their minimum competence to practice law. If they are not practice ready, how can they be minimally competent?

We have sidestepped this conundrum by adopting an artificially narrow definition of minimum competence. The bar exam tests some of the competencies that clients require, but it omits others. This distinction accommodates legal educators, but it harms clients. Every client deserves a lawyer who knows how to gather facts, perform research, conduct an interview, identify the client's goals, and negotiate on behalf of the client.

The IAALS study, like many others, confirms that law schools can teach these cognitive skills to students. Although licensed lawyers performed poorly on the IAALS client interview, law students

who had studied interviewing did much better. Fifty-one percent of those students gleaned all of the relevant facts during the client interview; on average, they learned 89 percent of the relevant information. Those numbers were significantly higher than the scores earned by licensed lawyers with no education in client interviewing.



Too Much

At the same time that the bar exam tests too little of the competencies new lawyers need, it requires too much memorization. The bar examiners' Code specifies that the exam should test legal reasoning and knowledge of "fundamental legal principles" rather than memorization of specialized rules. Even a cursory glance at the exam, however, reveals the extent of memorization it requires. Consider this sample Multistate Bar Exam (MBE) question from the NCBE website:

At a defendant's trial for extortion, the prosecutor called a witness expecting her to testify that she had heard the defendant threaten a man with physical harm unless the man made payoffs to the defendant. The witness denied ever having heard the defendant make such threats, even though she had testified to that effect before the grand jury. The prosecutor now seeks to admit the witness's grand jury testimony.

How should the court rule with regard to the grand jury testimony?

- (A) Admit the testimony, because it contains a statement by a party-opponent.
- (B) Admit the testimony, both for impeachment and for substantive use, because the witness made the inconsistent statement under oath at a formal proceeding.
- (C) Admit the testimony under the former testimony exception to the hearsay rule.
- (D) Exclude the testimony for substantive use, because it is a testimonial statement.

What is your answer? Although I regularly teach Evidence, supervise both criminal defense and prosecution clinics, and have authored a text on Evidence, I needed to refresh my memory before answering.

This question requires the test-taker to know not just the general concepts of hearsay, hearsay exceptions, and the criminal defendant's right to confront witnesses, but the details of two complex hearsay exceptions. Even consulting the text of those exceptions wouldn't point to the right answer; the test-taker would also have to know that a grand jury appearance counts as a "proceeding" for one of the exceptions.

Equally troubling, the rule tested by this question matters only in felony trials. The vast majority of crimes in the United States are misdemeanors, and grand juries don't charge those crimes. This is a useful question for television script writers to research, but it has little relevance to newly licensed lawyers. The answer, by the way, is (B).

In 1992, the ABA's Section on Legal Education examined the extent to which the MBE required memorization. Law professors and practitioners reviewed dozens of questions and scored each one on a scale from 1 to 5 in which "1" indicated that the question placed "almost total emphasis on memorization" and "5" signified that the question required "almost total emphasis on reasoning skills."

Responses clustered close to "3" with a mean response of 3.1. Stephen Klein, an NCBE consultant, interpreted this result to suggest that the questions "were equally balanced between memorization and legal reasoning skills." The bar exam, however, is not supposed to balance memorization and legal reasoning; it is supposed to test reasoning skills instead of memorization. The ABA study confirms what test-takers routinely report: most questions require examinees to recall a memorized rule before they can use legal reasoning to apply the rule.

No one, to my knowledge, has performed this type of study since 1992. It would be illuminating to repeat. But there is an even simpler way to determine whether the bar exam requires too much memorization: administer the exam to practicing lawyers. The supreme court in each state could randomly choose 40-50 practicing lawyers and ask those attorneys to take a three-hour segment of the bar. The chosen lawyers would receive this assignment with two weeks' notice, foreclosing extensive review, and would take the exam segment at the same time as candidates.

Lawyers have a professional obligation to accept court-appointed clients, so I hope they would also accept this type of assignment. Courts could sweeten the deal by awarding CLE credit to participants and promising to keep their scores confidential. These recruits would perform a significant public service: they would help assess the bar exam's validity, thereby improving legal representation for all clients.

How would these licensed lawyers perform on the bar? If the exam tests fundamental legal principles and legal reasoning, they should score quite well; experienced lawyers possess more than minimum competence in these matters. But if the bar tests memorized rules from multiple practice areas, the experienced lawyers will perform poorly. That type of memorization does not pay off in practice.

But don't all lawyers need to know the law? They do. Competent lawyers "know" the law in complex ways. They recall some basic principles from memory, but they consult codes, desk books, online sources, and personal notes more often than they draw from memory. Knowledge is essential for law practice, but professional knowledge is not the same as memorization.

Can We Fix It?

By testing too much and too little, the bar exam endangers clients and treats applicants unfairly. Our failure to adequately define minimal competence—or even to abide by the definition reflected in the bar examiners' Code—also raises disturbing questions the bar's disproportionate racial impact. We cannot tolerate these problems any longer. The question is not "can we fix the bar exam?" but "how soon can we fix it?"

Individual states could address this problem, as a few states have tried to do. It would be more effective, however, for states to pool their efforts—especially as state supreme courts consider adoption of a uniform exam.

I propose creation of a National Task Force on the Bar Exam. This group would study current approaches to the bar exam, develop a more realistic definition of minimum competence, and explore best practices for measuring that competence. AALS, the Conference of Chief Justices, ABA Section of Legal Education and Admissions to the Bar, and NCBE could jointly sponsor the task force.

To inform its deliberations, the task force should commission more studies of the work that new lawyers perform; that knowledge is essential to refine our concept of minimum competence. The group should also explore innovative ways to test for that competence. The task force's recommendations would not bind any state, but those proposals could inform decisions within the states. The recommendations could also guide development of testing instruments by NCBE and other organizations.

Here are some of the many ideas that the task force could consider:

- Develop MBE and essay questions that test fundamental principles and legal reasoning, rather than memorization. As proposed above, practicing lawyers could serve as test subjects to validate these questions.

- Allow test-takers to refer to notes, codes, and other sources while taking the bar exam. This practice would more accurately measure professional knowledge.
- Develop tests for more of the competencies that new lawyers perform.
- Replace some (or all) multiple-choice and essay questions with performance-oriented case files like those presented on the Multistate Performance Test (MPT).
- Allow examinees to take portions of the exam at different times, including after the first year of law school.
- Work with law schools to create lawyering classes that would substitute for portions of the bar exam, as the University of New Hampshire has done. Bar examiners could audit these classes for content and rigor.
- Encourage bar associations, law schools, and other organizations to develop postgraduate lawyering institutes to replace some (or all) of the bar exam. Law graduates currently spend more than \$100 million annually on bar review courses—in addition to the fees they pay to take the bar. That money could support six to eight week intensive summer programs to teach and assess new graduates' lawyering competence.

These ideas do not foreclose others; the task force should rest its recommendations on research-based evidence. I offer these ideas simply to illustrate that we are not tied to the current bar exam; we have many options that could better serve clients, candidates, and the diversity of our profession.

Conclusion

Some legal educators have raised concerns about the bar exam because an increasing number of their students are failing. I am not part of that group. Law schools have an obligation to prepare students to satisfy our profession's definition of minimum competence. We cannot change that definition simply because graduates find it harder to meet.

The problems with our bar exam, however, date back decades—encompassing years with high pass rates as well as low ones. An exam's pass rate tells us little about the test's validity. Rather than worry about pass rates, legal educators should focus on validity. Most important, we must develop a definition of minimum competence that tracks the real work of new lawyers.

This will not be an easy task for law schools. We will have to examine our assumptions about law practice and lawyering competence. If we want bar examiners to change their approaches, we may have to revise parts of our own educational model. The work, however, comes at a good time. Our profession is struggling to define itself in the face of changing technologies,

business practices, and client needs. If we more fully identify our professional competencies, teach students to achieve those competencies, and develop a valid licensing system, we will help build a stronger profession.

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WOMEN IN LEGAL EDUCATION

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Call for Papers for the AALS Scholarly Papers Competition

To encourage and recognize outstanding legal scholarship and to broaden participation by new law teachers in the Annual Meeting program, AALS is sponsoring a call for papers for the 32nd Annual AALS Scholarly Papers Competition. The competition is open to law faculty, including VAPs (Visiting Assistant Professors), who have been teaching for 5 years or fewer as of July 1, 2017. Time spent as a VAP counts toward the requirement of being a full-time educator for five years or less. Eligible faculty are invited to submit a paper on a topic related to or concerning law by August 4, 2017.



2017 AALS Scholarly Papers Competition Winner Christopher Walker (Ohio State Law) with review committee chair Michelle Wilde Anderson (Stanford Law)

A committee of established scholars will review the submitted papers with the authors' identities concealed. Papers that make a substantial contribution to legal literature will be selected for presentation at the 2018 AALS Annual Meeting in San Diego. For additional guidelines and complete submission instructions, visit www.aals.org/am2018/scholarly-papers/. Questions may be directed to scholarlypapers@aals.org.

AALS SECTION OF THE YEAR AWARD

The Association of American Law Schools is pleased to announce the inaugural AALS Section of the Year Award. This award recognizes excellence in member support and other activities that promote AALS Core Values. The deadline for nominations is June 16, 2017 and the award will be presented to up to two sections at the 2018 AALS Annual Meeting in San Diego. For the full announcement and a link to the nomination form, please visit www.aals.org/Sections. Questions can be directed to sections@aals.org.

Journal of Legal Education Releases Spring 2017 Issue

The *Journal of Legal Education (JLE)* recently released its Spring 2017 issue. This edition begins with a detailed history of the founding of the AALS Section on Sexual Orientation and Gender Identity Issues, including discussions of:

- “Cincinnati: Before and After (A Love Story)” by Patricia A. Cain and Jean C. Love
- “Fortuitously Present at the Creation” by Arthur S. Leonard
- “Amor y Esperanza: A Latina Lesbian Becomes a Law Professor” by Elvia Rosales Arriola
- “How Does a Radical Lesbian Feminist Who Just Knows How to Holler Somehow Become a Noted Legal Scholar?” by Nancy D. Polikoff
- “Educating the Next Generations of LGBTQ Attorneys” by Ruthann Robson
- “Sexual Minorities in Legal Academia: A Retrospection on Community, Action, Remembrance, and Liberation” by Francisco Valdes
- “Time for a Change: 20 Years after the ‘Working Group’ Principles” by Barbara J. Cox

This issue also features articles addressing the American Bar Association (ABA) Accreditation Standard 405(c), which sets minimum standards for the employment terms of clinical faculty at accredited law schools:

- “Best Practices for Protecting Security of Position for 405(c) Faculty” by Melissa H. Weresh
- “Rhetoric and Reality in the ABA Standards” by Linda L. Berger
- “The Problem with ABA 405(c)” by Kathryn Stanchi
- “‘Best Practices’: A Giant Step Toward Ensuring Compliance with ABA Standard 405(c), a Small Yet Important Step Toward Addressing Gender Discrimination in the Legal Academy” by Kristen Konrad Tiscione
- “On Writing Wrongs: Legal Writing Professors of Color and the Curious Case of 405(c)” by Teri A. McMurtry-Chubb
- “Employment Law Considerations for Law Schools Hiring Legal Writing Professors” by Ann C. McGinley
- “Academic Freedom, Job Security, and Costs” by Richard K. Neumann, Jr.
- “ABA Standard 405(c): Two Steps Forward and One Step Back for Legal Education” by Peter A. Joy
- “Standard 405 and Terms and Conditions of Employment: More Chaos, Conflict and Confusion Ahead?” by Donald J. Polden and Joseph P. Tomain



Book reviews in this issue include: “The Burger Court and the Rise of the Judicial Right—Michael Graetz and Linda Greenhouse” reviewed by Alan B. Morrison; “Bluebook: A Uniform System of Citation—The Worst System of Citation Except for All the Others” reviewed by David J.S. Ziff; and “Practical Citation System—Berkeley Journal of Gender Law and Justice” reviewed by William R. Slomanson.

The *Journal of Legal Education*, under the editorial leadership of Northeastern University School of Law and the University of Washington School of Law, addresses issues of importance to legal educators, including curriculum development, teaching methods, and scholarship. Published since 1948, it is an outlet for emerging areas of scholarship and teaching.

The *JLE* website (jle.aals.org/home/) run by AALS serves as a repository for current and past issues of the *JLE* as well as subscription, submission, and copyright information.





2018 Annual Meeting Theme: Law Schools and Access to Justice

Paul Marcus, AALS President and Haynes Professor of Law, William & Mary Law School

Access to justice is at the core of our constitutional society. Supreme Court Justice Lewis Powell once wrote, “Equal justice under law is not merely a caption on the facade of the Supreme Court building; it is perhaps the most inspiring ideal of our society.”

For a long time, many law schools recognized the importance of training students to work for this fundamental ideal. While much has been done, clearly the needs remain great. In the criminal justice area, a dearth of lawyers results in criminal defendants being deprived of their constitutional right to counsel. The difficulties on the civil side are just as troubling: for every client served by a legal aid group, one person who seeks help is turned down because of insufficient resources.

The story of the admirable efforts by law faculty members and students to meet these great needs is not well-publicized. But our story, as members of AALS, is all about dedicated students and faculty members across the United States who diligently pursue the goal of equal justice for all by providing sorely needed legal representation.

It is an exciting story of the recent explosion, in number and variety, of legal clinics at our member schools. These clinics focus on an enormously broad set of legal issues involving disabilities, Native American concerns, low income taxpayers, special education, social security, elder law, civil rights, domestic violence, criminal defense, and consumer issues among many other fields. Most recently, we have seen the tremendous efforts of law students and faculty members across the nation to assist in the lawful immigration process of many seeking to come to—or remain in—the United States.

Our story is what we are bound to do. As written by Supreme Court Justice Sonia Sotomayor, “We educated, privileged lawyers have a professional and moral duty to represent the underrepresented in our society, to ensure that justice exists for all, both legal and economic justice.”

This larger story of what we as legal educators can do, and what we and our students are doing, to assure fairness in law for our less fortunate citizens is an exhilarating and uplifting story.



AALS Calendar

2017

Midyear Meeting, Sponsored by Section on Criminal Justice

Sun., June 11 – Wed., June 14
Washington, DC

Workshop for New Law School Teachers

Thu., June 22 – Sat., June 24
Washington, DC

Faculty Recruitment Conference

Thu., November 2 – Sat., November 4
Washington, DC

2018

Annual Meeting

Wed., Jan. 3 – Sat., Jan. 6
San Diego, CA

Conference on Clinical Legal Education

Sun., Apr. 29 – Wed., May 2
Austin, TX

Workshop for New Law School Teachers

Thu., June 7 – Sat., June 9
Washington, DC

Faculty Recruitment Conference

Thu., Oct. 11 – Sat., Oct. 13
Washington, DC

2019

Annual Meeting

Wed., Jan. 2 – Sun., Jan. 6
New Orleans, LA