SALT
EQUALIZER

Volume 2002, Issue 3 | Society of American Law Teachers | August 2002

In This Issue

SALT EQUALIZER

The *SALT Equalizer* is a publication of the Society of American Law Teachers and is published quarterly.

Eric S. Janus	Editor
Paula C. Johnson	Co-President
Michael Rooke-Ley	Co-President
Norm Stein	Treasurer
Joyce Saltalamachia	Historian
Mary McGlynn	Layout

To contact the *SALT Equalizer*, write the editor at William Mitchell College of Law, 875 Summit Ave., St. Paul, MN 55105-3076; call 651-290-6345; or e-mail ejanus@wmitchell.edu. Visit the SALT web site at www.saltlaw.org.

SALT Teaching Conference Addresses War, Peace & Pedagogy

Nancy Ehrenreich, University of Denver College of Law
Deborah Waire Post, Touro College, Jacob D. Fuchsberg Law Center

On October 11 and 12, SALT will sponsor a teaching conference addressing the legal issues raised by events of the last year, and the challenges they pose for progressive pedagogy. The conference, titled **"Teaching in Crisis, Teaching About Crisis: Law, Peace and Pedagogy,"** will be held at Fordham Law School in New York City.

On Friday, Oct. 11, at 9 a.m., the conference will open with a panel on **"Clinical Teaching and Lawyering in Response to 9-11."** This session will be a roundtable discussion by clinicians and their students of the work they have done to respond to the legal fallout of Sept. 11 —including the civil liberties crackdown that has hit many immigrants, especially Muslims, and the detentions of Afghans at Guantánamo Bay. Confirmed speakers include: Ellen Chapnick (Columbia), Anthony Fletcher (New York Law School), Nancy Morawetz (NYU), Lori Nessel (Seton Hall), Gemma Solimene (Fordham), and Cynthia Soohoo (Columbia). All will bring students to join in the discussion.

At lunch on Friday, our keynote speaker will be **Erwin Chemerinsky**, Sydney M. Irmas

Teaching *continued on page 14*

Co-Presidents' Column

Paula C. Johnson, Syracuse University College of Law
Michael Rooke-Ley, Eugene, Oregon

Greetings, SALT members. Welcome back from what we hope was a much deserved respite this summer, providing you with fresh energy and enthusiasm as we begin the new academic year. Our committee members have continued to work over the summer on the enormous array of SALT projects, and we are eager to share our progress and upcoming plans with you. In these increasingly volatile times, we are ready to join with you in addressing the challenges we face in the classroom, in the profession, as well as in the domestic and international communities.

As we return to our classrooms and other institutional capacities this year, we will be reminded that one year ago, we experienced tremendous grief and loss upon the deaths of nearly 3,000 citizens of the United States and other countries in the September terrorist attacks. Our government has responded with retaliatory violence in Afghanistan, instituted

Presidents' Column *continued on page 15*

November Elections for Co-Presidents and Board of Governors

Holly Maguigan, New York University

The Nominations Committee invites recommendations for candidates to stand for election in November 2002. Two co-presidents-elect and 12 board members will be elected. The board members' terms begin January 2003, and the new co-presidents will take office in January 2004.

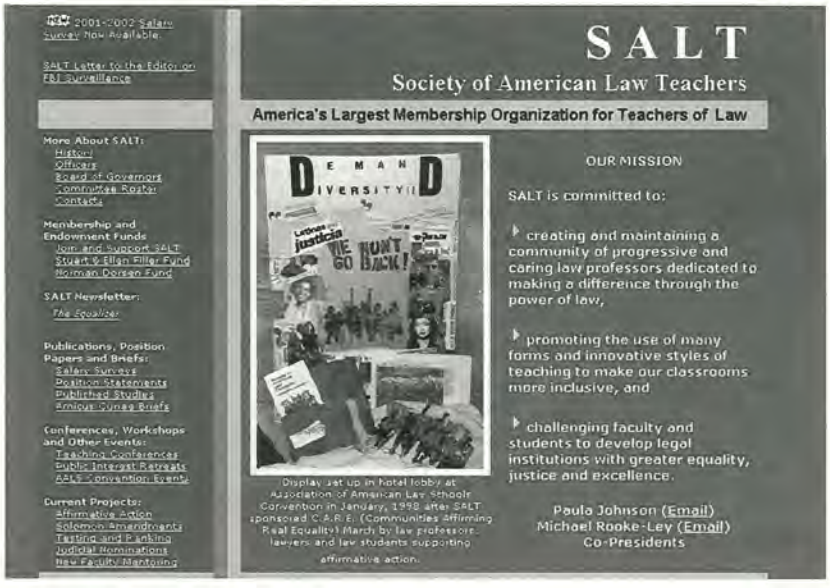
Nominations should be sent to any member of the committee and should be accompanied by a brief statement that includes each nominee's current school and contact information. Committee members are Holly Maguigan, NYU, chair, holly.maguigan@nyu.edu; Elvia Arriola, Northern Illinois, earriola@niu.edu; Lisa Iglesias, Miami, iglesias@law.miami.edu; Christine Zuni Cruz, New Mexico, zunich@law.umn.edu; and Neil Gotanda, Western State, neilg@wsulaw.edu.

If members have information about a nominee's involvement in SALT activities, the committee will be grateful to receive it. Current Board members whose terms are expiring are eligible for nomination: Elvia Arriola (Northern Illinois), Sue Bryant (CUNY), Martha Chamallas (Pittsburgh), Christine Zuni Cruz (New Mexico), Jane Dolkart (SMU), Lisa Iglesias (Miami), Eileen Kaufman (Touro), Peter Margulies (St. Thomas), Beverly Moran (Vanderbilt), Avi Soifer (BC), and Steve Wizner (Yale). Nominations of people who have not served on the Board, or who have not served recently, are very welcome.

Since the co-presidents serve as a team, the members of the committee are especially eager to receive nominations of teams. Individual nominations will also assist the committee, of course. If nominees for co-president have not served on the Board, the nominating statement should include a short description of a nominee's equivalent experience with SALT governance.

The deadline for nominations is September 13, 2002. Members are urged to send names to the committee before that even if they do not, at the time of the first communication, have full information about the nominee's SALT experience.

Check Out SALT's New Web Site: www.saltlaw.org



SALT Solomon Amendment Committee

Marc Poirier,
Seton Hall University School of Law

This spring and summer, a lobbying effort has taken priority over other projects. The SALT Solomon Amendment Committee (working with Immediate Past Co-President Carol Chomsky) has sought to derail a provision in the Senate version of the 2003 Defense Authorization Act that appears to undermine the status quo concerning the Solomon Amendments and on-campus military recruiting. The action is now focused on the conference committee. Our efforts have successfully attracted the interest of the Human Rights Campaign (HRC), a major lesbian/gay lobbying group. HRC is working with Senator Carl Levin, chair of the Senate Armed Forces Committee, with the goal of achieving in conference committee either (a) an adoption of the House version, which does not contain any new provision on campus military recruiting, or (b) a statement in the Conference Report that the Senate provision does not change the status quo. HRC is also working with Barney Frank on the House side to get his strategy advice, and in case effort on the House side of the conference committee is required.

The underlying issue is a provision inserted in the Senate version of the defense authorization bill by Senator McCain as part of a package called the National Call to Service Bill. Section 542 of S. 2514 would amend 10 U.S.C. Section 503 to require any institution of higher education that receives funds under the Higher Education Act of 1965 to allow

***Solomon** continued on page 13*

The American Constitution Society

David Halperin, Executive Director, American Constitution Society

David Halprin is executive director of the American Constitution Society.

I am grateful for the opportunity to communicate with SALT members about the American Constitution Society.

Lawyers, law professors, law students, judges, and others formed ACS in spring 2001. Through campus and lawyer chapters, speaking and media programs, research and publications, we seek to counter the narrow conservative vision that today dominates American law. We want to strengthen the intellectual underpinnings of, and the public case for, a more progressive vision. We want to restore the fundamental principles of respect for human dignity, protection of individual rights and liberties, genuine equality, and access to justice to their rightful — and traditionally central — place in our law.

We were delighted to see Professor Rooke-Ley and other SALT members at one of our recent events, a Washington, D.C. debate over whether conservative judges have ventured into unprincipled judicial "activism." I hope that members of SALT who have not already joined ACS will do so, and that ACS and SALT will work collaboratively on common endeavors.

In less than a year, ACS has grown from a student chapter at Georgetown Law Center — founded by Georgetown law professor Peter Rubin, who now serves as ACS's national president — to 50 strong, active campus chapters, with students and faculty now working to form chapters at dozens more law schools. Outstanding law professors from every region of the country serve as ACS chapter faculty advisors. ACS chapters already have held a wide range of speaking programs, addressing topics from terrorism to federalism, the Enron collapse to environmental protection, judicial nominations to campaign finance reform. Speakers at our events have included Hillary Rodham Clinton, Paul Wellstone, Barney Frank, Jesse Jackson, Jr., Janet Reno, Seth Waxman, Abner Mikva, Elaine Jones, and Anthony Romero; federal judges including Nathaniel Jones, Mary Schroeder, Stephen Reinhardt, David Tatel, Theodore McKee, and Diana Gribbon Motz; many, many law professors; and most of the members of the ACS advisory board, which includes: Mario Cuomo, Charles Mathias, Abner Mikva, Patricia Wald, Shirley Hufstedler, William Norris, Deval Patrick, Maria Echaveste, Brooksley Born, and law professors Drew Days, Walter Dellinger, Christopher Edley, Frank Michelman, and Laurence Tribe.

Our events have drawn overflow, enthusiastic audiences. ACS chapters already are branching out into other activities: research projects, Web sites, publications. And students are using ACS as a gathering place where they can learn about a wide range of opportunities for bringing positive change to the law.

With strong demand from lawyers to participate in our programs, we now are expanding into lawyer chapters, beginning in Washington D.C., Los Angeles, and Minneapolis-St. Paul. ACS lawyer chapters, whose members include law professors, already are holding programs. These chapters will allow lawyers to connect to a range of opportunities, including exchanges with our student chapters.

ACS does not, as an organization, lobby, litigate, or take positions on specific issues, pending cases, legislation, or nominations. We do encourage our members to make up their own minds and make their voices heard. We are forging cooperative relationships with a number of progressive legal groups, including another emerging group, the Equal Justice Society.

We hope that more and more members of SALT will participate in ACS: as speakers; as faculty advisors to campus chapters (if you don't have a chapter on your campus yet, we're ready to help you start one); as members of lawyer chapters; and as articulate spokespersons participating in our national media program. We also hope to work with SALT and others to help encourage, strengthen, and highlight rigorous legal scholarship aimed directly at solving pressing problems in law and policy.

We would welcome your views on how to move ACS ahead. You can contact us at info@AmericanConstitutionSociety.org . We encourage you to learn about and join ACS at our web site: www.AmericanConstitutionSociety.org .

Thanks and best wishes.

First Monday Civil Liberties in a New America

First Monday, a program of the Alliance for Justice, will be on October 7, 2002. This year the program will focus on protecting civil liberties in a post-9/11 society. The Alliance for Justice is producing a documentary film which can be used to form the center of a First Monday program. SALT urges all of you to help your school plan a first Monday Program, including speakers, panels, and community forums. Speakers in the areas of civil liberties, national security, international human rights, and Internet and e-mail privacy would present a lively program. For more information about First Monday, including written background material, contact the First Monday Web site at www.firstmonday2002.com.

Affirmative Action in Legal Education: The Grutter Litigation

The Sixth Circuit Speaks: Affirmative Action Update

Jack Chin,
University of Cincinnati College of Law, and
Margaret Montoya,
University of New Mexico School of Law


On May 14, 2002, the Sixth Circuit reversed a district court ruling invalidating the University of Michigan's law school diversity admissions program. (*Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (en banc)). Apart from the precise vote—the court divided 5–4, just as the Supreme Court did in *Bakke* itself—the much-anticipated decision was in many ways what might have been expected. The majority opinion, written for five judges by Chief Judge Boyce Martin, held that in spite of the absence of a single opinion signed by five justices, a majority of the *Bakke* Court recognized that achieving a diverse student body was a compelling interest that authorized appropriate diversity-based affirmative action. Although subsequent cases in other contexts might arguably undercut this holding of *Bakke*, the majority concluded that courts of appeal were not free to disregard *Bakke* unless and until it was specifically overruled. The court determined that the Michigan program was consistent with *Bakke* because the law school considered each applicant individually, based on his or her characteristics and accomplishments. And while Michigan sought a critical mass of students of color, it did not employ a quota. The four dissenting judges disagreed on all of these points, and the Center for Individual Rights, which represented the plaintiffs, has promised to petition for *certiorari*.

Much less predictable was an attack launched by the main dissenter, Judge Danny Boggs, against the majority. Judge Boggs' opinion for three judges included a "Procedural Appendix" which, he implied, may have reflected an effort on the part of some in the majority to improperly influence the outcome of the case. According to *The New York Times*, House Judiciary Committee Chair James Sensenbrenner requested documents from Judge Martin on the course of proceedings, suggesting there may be a congressional investigation.

The appendix clearly reflects a remarkable lack of collegiality on the court; Judge Karen Nelson Moore, appointed to the court from the faculty of Case Western, wrote a concurrence questioning both the decision to file the appendix and its accuracy. Three other judges joined this opinion. The dissenters filed two additional opinions addressing the appendix: Judge Siler noted that he did not concur in the addition of the procedural appendix because he did not believe it necessary for this disposition of the case; Judge Alice Batchelder filed a dissent emphasizing that she did concur in the appendix. However, Judge Boggs' claims represent a tempest in a teapot, not only because Rule 2 of the Federal Rules of Appellate Procedure and the local rules of the Sixth Circuit specifically authorize the court to suspend otherwise applicable rules in any given case for "good cause," but also because any rule violations Judge Boggs identified are clearly harmless or technical at worst.

The procedural appendix raised two main contentions. The first was that Chief Judge Martin improperly assigned himself to the three-judge panel initially responsible for the case. Judges Moore, Martha Daugherty, and a visiting judge heard an interlocutory appeal in the case in 1999, and as permitted by Sixth Circuit rule, they were entitled to elect to hear subsequent appeals in the same case, which is what happened here. However, the visiting judge was not included as part of the panel, and the rule suggests that the third spot must be filled at random.

While Chief Judge Martin's self-assignment may have been a technical violation of the Sixth Circuit's own rules, it was unquestionably harmless. The appeal was ultimately argued and decided *en banc* as an initial matter, and Judges Moore and Daugherty wound up in the majority. Thus, the identity of the third member of the initial panel turns out to have made no difference, because the panel never voted on the merits of the appeal, and even if they had, the third member could not have affected the outcome because two members supported the University of Michigan. Chief Judge Martin's self-assignment also does not plausibly reflect an effort to keep the decision from the rest of the court; Chief Judge Martin voted for the case to be heard *en banc*, an odd thing to do if he were trying to keep the case out of the hands of his colleagues so a hand-picked group could decide the case.

Judge Boggs also claimed that Judge Martin delayed distributing a request for *en banc* consideration until two judges appointed by Republican presidents had taken senior status and thus were no longer eligible to participate in the *en banc* decision. However, it is not clear that any rule required the full court to consider all requests for initial hearing *en banc* (Sixth Circuit Internal Operating Procedure 35, which Judge Boggs claimed was violated, is

Affirmative Action *continued on page 13*

SALT's Public Statement Regarding the Grutter Decision on Affirmative Action

The Society of American Law Teachers (SALT) welcomes the decision issued today by the Sixth Circuit Court of Appeals in the case of *Grutter v. Bollinger, et al.*, overturning the District Court's ruling that the University of Michigan Law School's admission process was unconstitutional.

The Court today ruled that the Law School's interest in achieving a diverse student body is a compelling state interest, pursuant to the Bakke case decided by the Supreme Court in 1978, and further held that its admission policy was narrowly tailored to serve that interest. The Sixth Circuit heard the case *en banc* and issued a 5–4 majority opinion with two concurring and four dissenting opinions. The impassioned rhetoric on both sides and the almost unprecedented public wrangling about the Court's internal procedures corroborate the importance of this case.

This case marks the first time that there has been a full trial on the merits about affirmative action in student admissions. The defendants, both the university and the student intervenors supported by SALT, marshaled an array of experts to make the case that prohibiting the consideration of race and ethnicity would resegregate the selective colleges and universities as well as most graduate and professional programs.

In reiterating SALT's 30-year commitment to access, diversity, and academic excellence, the values that are at the core of affirmative action, SALT Co-president Paula C. Johnson stated, "Today the Sixth Circuit took an historic step to advance the quest of this society for greater equality and meaningful educational opportunity. If the Supreme Court accepts *Grutter v. Bollinger* on appeal, it can vindicate the promises of *Brown v. the Board* and *Bakke*. SALT's determination to defend affirmative action is reinvigorated."

Kudos to ...

■ SALT board member Jack Chin was elected to the American Law Institute in May. He became interested in the ALI because of its reopening of the Model Penal Code's sentencing provisions; "it would be wonderful," Jack said, "if the new version of the MPC could be a model for facilitating reentry into law-abiding society of the hundreds of thousands of people released from prison every year." Jack is the reporter to the ABA Task Force on Collateral Sanctions, which is also working on the problem of prisoner reentery. Jack's candidacy was supported by SALT member Ellen Podgor of Georgia State.

■ Professor Pamela Edwards of CUNY presented Professor Deborah Waire Post of Toura Law School with the Haywood Burns/Shanara Gilbert award at the Northeast People of Color Scholarship Conference at the beautiful Casuarina Hotel in May 2002. The award is named after two beloved CUNY law professors who tragically died in a car accident in South Africa and is given to someone each year who exemplifies commitment to public interest and social justice. Professor Post spoke about her commitment to social justice, commenting that it gives meaning to her work and is a significant thread linking her with others, including SALT members.

The SALT *Bakke* Brief: Affirmative Action Then and Now

Robert A. Sedler,
Wayne State University Law School

When *Grutter v. Bollinger,* the University of Michigan Law School affirmative action case, or a similar case, finally reaches the Supreme Court, SALT surely will file an amicus brief in support of affirmative action, as it did in the landmark case of *Bakke v. Board of Regents*. It was my privilege to be the principal author of that brief, working together with Arval Morris of the University of Washington and SALT President Howard Lesnick of the University of Pennsylvania. Our substantive constitutional arguments were based on a law review article that I did for a Santa Clara Law Review symposium on the *Bakke* decision of the California Supreme Court. (*Racial Preference, Reality and the Constitution*, 17 SANTA CLARA L. REV. 329 (1977)). Our factual arguments were based on a law review article that Arval Morris did in the same symposium, demonstrating that at that point in time it was only the use of race-conscious admissions policies that would secure the admission of a reasonable number of minority students to the nation's law schools and medical schools (*Constitutional Alternatives to Racial Preferences in Higher Education Admissions*, 17 SANTA CLARA L.REV. 279 (1977)).

Our arguments in the brief were based on the reasons for affirmative action at the time of *Bakke*. When race-conscious

***Bakke** continued on page 16*

Judicial Selection Committee

Bob Dinerstein, Chair

These have been interesting times in Washington, D.C., this summer, what with the proliferation of color codes (sometimes for air quality, sometimes for security threats), the congressional response to Enron, WorldCom, et al., and the latest machinations of Attorney General Ashcroft. Nor has all been quiet on the judicial nomination front.

Back in May, on behalf of SALT, committee chair Bob Dinerstein, along with Co-President Michael Rooke-Ley and Treasurer Norman Stein, were part of a group of law professors who came to Washington in conjunction with what the Alliance for Justice called Professor Lobby Days 2002. We met with various Senate staffers in connection with the Judiciary Committee's consideration of the nomination of U.S. District Court Judge D. Brooks Smith for a position on the U.S. Court of Appeals for the Third Circuit. Among other things, it had taken Judge Smith 11 years to resign from a club that discriminated against women, despite promising the Judiciary Committee to do so when he appeared before it in 1988. His record also raised troubling ethical issues and included a speech highly critical, on federalism grounds, of the Violence Against Women Act. Despite our best efforts, however, the committee voted to recommend Smith's elevation to the Third Circuit, with three Democrats—Senators Biden, Kohl and Edwards—joining the Republican members of the committee in support of Smith. As of this writing, the full Senate has not yet acted on the nomination.

On July 23, the Judiciary Committee held hearings on Texas Supreme Court Justice Priscilla Owen, President Bush's nominee for the U.S. Court of Appeals for the Fifth Circuit. Justice Owen was subjected to extensive, pointed questioning from committee members, primarily regarding her decisions in a series of parental notification abortion cases (in one of which, her then colleague and now White House Counsel Alberto Gonzalez characterized her position as one reflecting "an unconscionable act of judicial activism"). On behalf of the committee, Beto Juarez submitted a detailed memorandum to the Alliance for Justice on the judicial ethics violations presented by Justice Owen's direct lobbying of then-Governor Bush on behalf of a prison ministry program. As of this writing, the Judiciary Committee has not yet acted on the Owen nomination.

"Nor has all been quiet on the judicial nomination front."

In addition to engaging in the above actions, SALT Judicial Selection Committee members have been involved in researching the above nominees' unpublished opinions in selected areas, including the Americans with Disabilities Act, the Civil Rights of Institutionalized Persons Act, and juvenile justice.

As it stands now, there is talk of an agreement between the White House and Senate Democrats to give hearings to a number of Bush judicial nominees in exchange for appointment of pending Democratic nominees to federal agencies. The agreement is not yet operative because of the opposition of Senator John McCain, but it is likely that at some point—probably after the August recess—the judicial nomination hearings will proceed in earnest. A number of problematic nominees await hearings, including Jeffrey Sutton, Carolyn Kuhl, John Roberts, and Miguel Estrada. While no dates have been set yet on these nominees, if the past is any guide they will be scheduled without a great deal of notice.

Committee chair Bob Dinerstein met this week with Kendra-Sue Derby, director of field operations, and Lou Bograd, newly appointed legal director, of the Alliance for Justice, to continue discussions on the ways in which our two organizations can best work together on judicial selection issues. The Alliance has identified four judicial nominees with substantial numbers of written opinions whose hearings are not likely to be early in the fall. Our committee will be soliciting the assistance of SALT members in researching the opinions of the following nominees for the Sixth Circuit: Deborah Cook (currently on the Ohio Supreme Court); David McKeague (currently a U.S. District Judge for the Western District of Michigan); Henry Saad (currently on the Michigan Court of Appeals); and Richard Griffin (also on the Michigan Court of Appeals). Between researching these nominees, and being prepared to weigh in on the others mentioned above (as well as still others) it looks to be a busy fall for the committee. We welcome whatever assistance you are able to provide. If interested in working with us, please contact Bob Dinerstein at rdiners@wcl.american.edu.

Bob Dinerstein confers with Co-President Paula C. Johnson.

Extremist Nominees Don't Belong on the Federal Bench

Michael Rooke-Ley, co-president, SALT

Editor's Note: This column originally appeared in the *Miami Herald*, Monday, June 10, 2002, page 7B.

One would think that President Bush had been elected in a landslide and that Republicans in the House and Senate outnumbered Democrats 2-1. But, of course, Bush prevailed in the most disputed election in American history, losing the nationwide popular vote and winning the electoral vote on appeal to the U.S. Supreme Court. In Congress, the Democrats maintain control in the Senate (50-49-1), and the Republicans prevail in the House (222-211-2), each by the slimmest of margins.

The Bush administration, in an embarrassing lack of statesmanship, is behaving as if it has a mandate from the American people to fill the federal courts with right-wing ideologues. The current slew of nominees to the courts of appeal requires the most careful scrutiny. These are lifetime appointments, and, given the small number of cases that are heard by the Supreme Court, these are the courts of last resort for most Americans. For Bush, these nominees, if confirmed by the Senate, will represent his most lasting legacy.

The Senate Judiciary Committee, chaired by Patrick Leahy, is to be congratulated for moving much more quickly than did the Republican-controlled committee with Clinton nominees and for rising above the tit-for-tat of political warfare. Of the 67 nominees who have had hearings already, 62 have been approved and forwarded to the full Senate, and 57 of those have been confirmed. But those who have just come before the committee, or who are likely to do so in the near future, represent great cause for concern.

Extremist *continued on page 12*

SALT Awards Dinner Committee

Margalynne Armstrong and Bob Dinerstein, co-chairs

The committee is hard at work identifying possible locations for the annual SALT dinner, to be held in conjunction with the AALS Annual Meeting in January 2003. This year's annual meeting will be in Washington, D.C. The dinner is tentatively scheduled for Saturday evening, January 4.

The committee is responsible for recommending to the Board of Directors recipients for two important awards. The **SALT Teaching Award** is an annual award given to a person who has made a special contribution to the teaching mission of the legal academy. Last year's winner was **Sylvia Law**; prior recent winners have included **Marjorie Schultz, Tony Amsterdam, Jim Jones, Haywood Burns, Barbara Aldave**, and **Trina Grillo**. The award has been given every year since 1976 (the first winner was **David Cavers**) and twice has gone to an institution (CUNY Law School and University of Wisconsin Law School) rather than an individual.

Margalynne Armstrong leads SALT 30th Anniversary singing with Michael Rooke-Ley and Chuck Lawrence.

The second award is the **SALT Human Rights Award**. This award, which is not necessarily given every year, recognizes the extraordinary work of an individual in advancing the principles of equality and equal access to legal education, the legal profession, and legal services. This award was created in 1997 after the death of **Shanara Gilbert**, who died in South Africa (in the same bus accident as **Haywood Burns**) while forging connections between clinical legal education and human rights advocacy in that country. Other recipients of the award have been **Dr. Jesse Stone, Jr.**, **Congressman Barney Frank**, and **Ibrahim Gassama**.

Nominations—which should be received by **September 30, 2002**— for either or both awards should be submitted to either of the committee co-chairs, who can be reached as follows:

Margalynne Armstrong
Associate Professor
Santa Clara University School of Law
500 El Camino Real
Santa Clara, CA 95053
(408) 554-4778 (o)
(408) 554-4426 (fax)
marmstrong@scu.edu

Robert Dinerstein
Professor and Associate Dean for Academic Affairs
American University, Washington College of Law
4801 Massachusetts Avenue, N.W.
Washington, D.C. 20016
(202) 274-4141 (o)
(202) 274-4015 (fax)
rdiners@wcl.american.edu

SALT Board to Meet October 13

The SALT Board of Governors will meet on October 13, 2002, at 8 a.m., at Fordham Law School in New York City. The meeting follows the SALT Teaching Conference "Teaching in Crisis, Teaching About Crisis: Law, Peace and Pedagogy," scheduled at Fordham on October 11 and 12. All SALT members are welcome to attend.

Faculty Mentoring Committee Plans "Best Practices" Study, New Faculty Programs

Devon Carbado, UCLA School of Law
Nancy Cook, Cornell Law School

The Faculty Mentoring Committee has several projects in the works. Major efforts are being made on three fronts: participation in the development of a Best Practices prototype; the hosting of a second New Teachers Orientation program just prior to the convening of the AALS Annual Meeting in January; and a program to coincide with AALS's new teachers conference.

The Best Practices project got underway in May, when SALT Board members Lisa Iglesias and Devon Carbado facilitated a discussion on promotion and tenure practices at the LatCrit VII conference in Portland, Oregon. One goal of this brainstorming session was to begin a conversation about how promotion and tenure practices are organized, structured, and institutionalized. The Faculty Mentoring Committee has since undertaken a joint effort with the Labor and Employment section of the AALS to begin gathering data about formal and informal practices and/or policies that serve to facilitate or interfere with entry into the life of the academy. Ultimately, the group is hoping to develop a best and worst practices report that can be used to promote and effectuate fair practices.

Following on the success of the first New Teachers' Orientation program that was held in January, 2002, the Mentoring Committee is planning a second program, to be held in Washington, D.C. on January 2, 2003. More details will be available soon.

The committee is also planning to organize an event that would coincide with the AALS's annual new annual new teacher's conference, which typically is held in mid-June in Washington, D.C.

SALT Distributes Statement on the Bar Exam

Eileen Kaufman, Touro College, Jacob D. Fuchsberg Law Center

The Committee on Access to the Profession recently finalized "SALT's Statement on the Bar Exam," which details SALT's critique of the existing bar examination. The statement explains SALT's conviction that the exam fails to measure professional competence to practice law, stands as a significant barrier to achieving diversity in the profession, and negatively impacts law schools in terms of curricular development and admissions policies. The primary author of the statement is Andi Curcio who has been an invaluable member of the committee. Andi recently completed an extensive article about the bar exam entitled "A Better Bar: Why and How the Existing Bar Exam Should Change," which will appear in 81 Univ. Neb. L. Rev. 1.

The SALT statement reflects our longstanding concern about the many pernicious effects of the bar exam. First, the statement describes the ways in which the exam fails to measure professional competence: by testing a very narrow range of skills, by testing those skills in a way unrelated to the practice of law, by overemphasizing the importance of memorizing legal doctrine, and by testing doctrine inapplicable to the law of the administering state. The statement also describes the many ways in which the bar exam negatively impacts on law

Bar Exam *continued on page 13*

SALT Bylaws Being Revised

Joyce Saltalamachia, New York Law School

Much of the administrative business of SALT is governed by its detailed bylaws. The timing of elections, the structure of the Board of Governors, and the eligibility of individuals to join the organization are just a few of the topics covered in our bylaws. While the bylaws have been periodically revised over the years, the Board is currently in the process of instituting the first comprehensive revision since 1996.

Many of the proposed changes will serve merely to conform the bylaws to existing practice. For example, we have had SALT co-presidents for many years, but the bylaws had never been changed to reflect this. Similarly, the positions of treasurer, editor, and historian have long been considered ex officio Board members, but the bylaws have treated them separately and differently. These changes are considered necessary to ensure that practice and policy are the same.

Other changes will have more of an effect on the policy of the organization itself, and for these the Board devoted a substantial amount of discussion at its May meeting. Of particular importance is the question of how many Board members need to indicate approval before the president or co-president is authorized to issue a policy statement or sign on to a statement of an allied organization. This question has come up repeatedly in recent years as SALT support has been increasingly solicited on a wide range of subjects. This certainly reflects SALT's status as an important and influential organization but has created difficulties with our

Bylaws *continued on page 9*

Bylaws:

▼ *continued from page 8*

existing bylaw provisions. Existing Article V governs that all requests for SALT to take a public position on any issue must first go to the standing committee on public positions which will then make a recommendation to the entire Board at the next Board meeting. In the event of a very pressing issue, the president is empowered to poll the Board and may make a statement on behalf of SALT if two-thirds of the Board voting (and at least a majority of the Board) approves. There has frequently been difficulties with this, particularly on occasions when sufficient numbers of Board members have not been available to respond in a timely manner. The bylaws committee has proposed that the president be given the flexibility to act on his or her own when the issues in question are essentially the same as positions taken in the past. Some Board members believe that, with e-mail becoming the preferred means of communication, the polling provision is not particularly difficult, while others felt that the flexibility is desirable and that it is sufficient merely to notify the Board when statements are made or positions taken. The Board is continuing to consider this matter.

Finally, while there have been occasions when it has been necessary to suspend the bylaws during a Board meeting, no provision has ever existed for this, so one is now being proposed.

The bylaws committee is currently incorporating the suggestions made at the May Board meeting into the final proposal, which will be presented to the Board by the fall. It hoped that this current revision will be sufficient for many years to come.

Committee Pushes Forward on Diversity Index

Vernellia Randall,
University of Dayton School of Law

This past semester the Diversity Committee focused on developing an index for communicating the commitment of law schools to diversity. In addition, the committee plans to develop an alternative guide to law schools. Co-chairs of the committee are Vernellia Randall, who is primarily responsible for the Diversity Index, and Roberto Corrada, whose work will focus on the guide book.

Ultimately, the Diversity Index will grade schools on their commitment to diversity in two areas: demographics and climate. The demographics grade will focus primarily on race and gender. The climate grade will look at the full range of diversity issues, with specific attention on race, gender, sexual orientation, and disability.

The committee discussed how to report the results of the index. The method of reporting affects how we collect the information. The results can be reported in a purely descriptive format, as a ranking, as a grade, or in some combination. The ranking was rejected because rankings measure performance on how well a school performs relative to other schools and not to any establish criteria. Ultimately, the consensus of the committee was that a grade with supplemental descriptive information would be best.

The other issue discussed during the spring is whether the initial index should focus only on demographics, or should extend to climate, as well. A diversity demographics grade could be fairly easily constructed, while developing a methodology for measuring climate would be more complex and time-consuming. We had discussions with Dr. Frances Pestello, who emphasized the importance of grading on information that could be consistently collected for all schools.

Plans for this academic year include developing a grade for "Race and Gender Diversity" (limited to demographics), developing a system for measuring climate and establishing SALT Diversity Liaisons.

Help Needed!

■ **We particularly need help on how to measure climate consistently on issues of sexual orientation and disability.** If you have ideas or thoughts, please contact Vernellia Randall, randall@udayton.edu.

■ **We need a SALT Diversity Liaison for each school.** The Liaison will review data collected, fill in blanks where possible and help us obtain information from the administration of their school where necessary. If you would be willing to be SALT Faculty Liaison for the Diversity Index, at your school please contact Vernellia Randall, randall@udayton.edu.

Timeline and Deadlines

■ Collect Race/Gender Demographic Data. Using SALT Faculty Liaison at each school to review the information
Deadline: Fall 2002

■ Complete Data Analysis on Race/Gender Demographic Grade and present information to the Board in Spring Meeting
Deadline: Spring 2003

■ Construct Diversity Index for measuring climate
Deadline: Spring 2003

■ Collect Demographic and Climate data
Deadline: Summer 2003

■ Complete data analysis and monograph
Deadline: Fall 2003

Why We Need Diversity in Law Schools — Lessons From a Night at the Movies

Alice M. Noble-Allgire,
Southern Illinois University School of Law

Editor's Note: The following is excerpted from an article currently under preparation by Prof. Noble-Allgire.

Nearly 25 years have passed since Justice Lewis Powell cast the swing vote in *Bakke,* recognizing that colleges and universities have a compelling interest in creating a diverse student body as a means of exposing the nation's future leaders to a diversity of viewpoints. His opinion laid the foundation for affirmative action admissions programs used at public law schools across the country for two decades, but has come under fire in several recent high-visibility cases, resulting in divergent opinions by two federal appellate courts. This article illustrates, through the lens of a single event at one law school, why the courts must reaffirm Justice Powell's vision of diversity and discusses what law schools should be doing to better implement that vision.

. . .

It is movie night at the law school — time for law students to grab a bag of popcorn and take in a contemporary movie featuring a law-related theme. . . . This month's selection is *A Time to Kill*, chosen in honor of Black History month. Based on John Grisham's first novel, this movie tells the story of an African-American man, Carl Lee Hailey, who killed two white men for raping, beating, and lynching Hailey's 10-year-old daughter. The movie poster in the hallway beckons patrons with a promise of a discussion about *Killing Bias in the Courtroom*, a theme chosen to explore Carl Lee Hailey's fear that a racially biased judicial system would not administer justice — either to his daughter's attackers or to him.

About two dozen people have come to see the film. The racial composition of the group is roughly similar to that found in a regular classroom: there are four students of color and the rest of the audience is white, including the faculty moderator and three other faculty members. . . . Near the close of the movie, the audience listens intently as Hailey's attorney gives his closing argument, which powerfully summarizes the details of the crime and the underlying racial issues:

> I set out to prove a black man *could* receive a fair trial in the South, that we are all equal in the eyes of the law. That's not the truth — because the eyes of the law are human eyes . . . and until we can see each other as equals, justice is never going to be evenhanded. It will remain nothing more than a reflection of our prejudices.
>
> . . .

Defense counsel then has the jurors close their eyes as he gives a moving summary of the brutal attack on Carl Lee Hailey's daughter and how she ultimately was thrown from a bridge into a river bottom some 30 feet below. "Can you see her?" he asks. "Her raped, beaten, broken body, soaked in their urine, soaked in their semen, soaked in her blood, left to die. Can you see her? I want you to picture that little girl." After an emotional pause, he chokes back tears and instructs the jurors: "Now imagine she's white."

Shortly after this scene, the movie ends and it is time for pizza and discussion. The audience is primed for a thoughtful conversation about the issues so vividly portrayed on the screen. So how does our faculty moderator (Professor A) . . . stimulate discussion about *Killing Bias in the Courtroom*? By attacking the Hollywood's portrayal of the trial scenes in the movie. . . . A second faculty member (Professor B), too, points to various scenes in the movie to illustrate that Hollywood never gets it right on these evidentiary matters. Ten minutes go by before a third faculty member (Professor C) tries to steer the discussion to the theme of the movie by asking: "Does race matter?" Professor A agrees that race is one theme in the movie; he says the other theme is revenge. Professor C persists: "Aren't the two themes tied together?" Professor A dismisses the idea. . . Professor A goes on to suggest that the movie is not realistic because the Ku Klux Klan, which played a significant role in the movie, no longer exists. Professor C challenged this assessment, pointing out that the Klan had staged rallies in communities near this law school within the recent past. "They're just a joke," Professor A said, ending that thread of the discussion. Were there others in the audience who had a different view? If so, there was no opportunity for them to express it; the conversation turned back to issues of evidence and other legal matters unrelated to racial bias.

Based upon the advertisements for this movie, members of the audience might reasonably have anticipated that night's discussion to focus on issues of racial bias in the judicial system. Indeed, it would seem almost inconceivable — particularly in a law school setting — to have an intellectual discussion of this movie without addressing the sense of disenfranchisement felt by Carl Lee Hailey. . . . Yet,

***Movies** continued on page 11*

Needed: Copies of Amicus Curiae Briefs

Richard Chused, SALT's webmaster, needs copies of Amicus Curiae briefs submitted on behalf of SALT to post on our new Web site. If you have any materials or information about where to get them, please contact Richard at chused@law.georgetown.edu. And check out our new site at www.saltlaw.org.

Movies:

▼ *continued from page 10*

but for a brief and forced repartee between two white faculty members, that exchange did not take place.

. . .

It is this type of dialogue that the sponsors of the movie night wanted to stimulate, based on the premise that communication of differing viewpoints might give participants a better understanding, if not acceptance, of the complexities of these issues.

. . .

Law schools can, and should, play a significant role in promoting racial discourse, as Justice Powell envisioned in *Bakke*. It is clear, however, that the legal academy is failing to capitalize on this opportunity. . . . Students surveyed at two prominent public law schools reported that professors were unwilling to discuss race even when a case directly addressed that issue. When race was discussed, students expressed frustration with how it was handled. There were complaints that the issue was emphasized too much or not enough, that particular views dominated the conversation, and that the discussions were hampered by a lack of diversity in the student body.

. . .

Productive discourse on racial issues requires knowledgeable and meaningful participation from whites and minorities alike. . . . This is not to suggest that white people have never experienced prejudice, that they cannot empathize with those who have, or that they cannot be forceful advocates for a minority viewpoint. Rather, this argument suggests that conversations about a racial issue — racial profiling by law enforcement agents, for example — are enriched by the perspective of a student or faculty member who has been stopped by the police using this technique, much the same way that the effects of sexual assault are better understood through the testimony of a person who has experienced that trauma.

. . .

Some have attacked this argument on the ground that it presumes that a person's race or ethnicity can predict their viewpoints. . . . There is a good likelihood, however, that minorities of all generations and classes have experienced — or will experience — racial prejudice in their own ways. It is this experience as a person of color that differs from the experiences of the majority. To the extent that individuals have had different experiences with prejudice, the argument for increased diversity is strengthened; law schools need the voices of *many* persons of color, not just one or two.

. . .

After the movie described at the outset of this article, three African-American students gathered to share their impressions with a white faculty member. Their comments underscore the importance of creating the appropriate environment for discussions of racial issues. . . . As suggested earlier, the first requirement is to recognize and raise the issue. . . . Secondly, faculty members must facilitate discussion and exchange of differing viewpoints on these issues. . . . They must also be willing to risk criticism from students, many of whom want to learn only the black-letter law required to pass the bar examination, rather than engaging in a discussion of the philosophical and social underpinnings of that law.

. . .

An additional hurdle that faculty members face is the personal discomfort of leading discussions on controversial topics. . . . To facilitate discussions, therefore, law teachers must bear in mind that their presence in the classroom is not as one among equals but as an authority figure and that there is a distinction between facts and opinion. . . . Where opinions are concerned, the class becomes a marketplace of ideas. An authority figure may have a more learned opinion than others, particularly if that opinion has been long studied and carefully considered, but that does not mean that other opinions are without value.

To encourage, rather than chill, discussion, a teacher should make it clear whether a statement is fact or opinion and, with the latter, invite discussion of other opinions. . . . Better yet, the teacher can invite the speaker to critically evaluate his or her own opinion, which not only avoids the appearance of pitting one student against another, but encourages students to develop their own analytical skills. . . . It is important for the teacher to apply these techniques evenhandedly to avoid the appearance that the teacher prefers one particular viewpoint or is allowing the class to gang up on an unpopular view. . . . To this extent, discussing diversity and other controversial issues is no different from discussing the majority and minority views on any rule of law that has produced a split of authority.

Through these and other teaching methods, any faculty member can create a safe environment for the exchange of diverse viewpoints that Justice Powell envisioned. . . .

"...law teachers must bear in mind that their presence in the classroom is not as one among equals but as an authority figure and that there is a distinction between facts and opinion."

SALT Opposes Expanded Immigration Enforcement Role for Local Police

Joan W. Howarth
Boyd School of Law, University of Nevada, Las Vegas

SALT has joined dozens of other organizations opposing the Justice Department's suggestion of broad of authority for local police to enforce immigration laws.

In May the SALT Board of Governors voted to add SALT's name to a statement in opposition to local police immigration enforcement written and circulated by the Coalition of Immokalee Workers of Florida. Co-Presidents Michael Rooke-Ley and Paula Johnson also sent a letter directly to Attorney General John Ashcroft stating SALT's opposition to any expansion of local police authority to enforce immigration law.

The Statement of the Coalition of Immokalee Workers (CIW) can be found at their Web site, www.ciw-online.org , which also features information on the CIW boycott of Taco Bell based on its farm worker labor practices.

The letter from SALT to Attorney General Ashcroft is below:

Dear Attorney General Ashcroft,

The Society of American Law Teachers is the largest membership organization of law professors in the nation, with over 700 law professors from more than 150 law schools. We are writing to state our opposition to the assertion that state and localities possess "inherent authority" to enforce immigration laws.

Our federal laws providing that the Immigration and Naturalization Service (INS) enforces immigration laws are supported by many sound policies. Bringing local police into immigration enforcement would undermine their essential law enforcement responsibilities in both immigrant and nonimmigrant communities; that is the primary reason that many local police agencies and officers have opposed such a proposal. A police department that begins to enforce immigration laws and spy on local residents will lose the trust of the community it serves and protects. In communities where people are afraid to talk to local police, more crimes go unreported, fewer witnesses come forth, and people are less likely to report suspicious activity. Many immigrants come from countries where people are afraid of the police, and many police agencies across the United States have spent years building trust that would be undermined by requiring these officers to do the job of a federal agency. As one local police chief has noted, "We're trying to build bridges with people living in fear. If police officers become agents of the INS, their ability to deal with issues such as domestic violence and crime prevention will be severely curtailed."

Furthermore, federal immigration law is a complicated body of law that changes frequently and requires extensive training and expertise to properly enforce. These laws inevitably involve questions of nationality and ethnic background, leaving abundant room for racial profiling and other forms of discrimination by local police without immigration experience. In the words of former INS Chief Officer Doris Meissner, "I have long been wary of deputizing local police because of fears they would misunderstand complex immigration laws and mistakenly violate civil rights."

The terrors of September 11 have changed our country forever. Those changes must not include, however, dangerous law enforcement initiatives that rest on dubious legal authority and that threaten to erode the civil liberties of many Americans. We would be pleased to hear your current thoughts on these matters, and we invite you to contact us if we can provide any further information.

Sincerely,
Michael M. Rooke-Ley
Paula C. Johnson
Co-Presidents

Extremist:

▼ *continued from page 7*

Nominees in the current pipeline include D. Brooks Smith (Pennsylvania) for the Third Circuit; Lavenski Smith (Arkansas) for the Eighth Circuit; Priscilla Owen (Texas) for the Fifth Circuit; Miguel Estrada (Washington, D.C.) for the D.C. Circuit; Michael McConnell (Utah) for the 10th Circuit; and Jeffrey Sutton (Ohio) for the Sixth Circuit. Their records demonstrate an overt hostility to the protection of civil rights and liberties and, most troubling, a conscious disrespect for Congress's constitutional power to safeguard those rights.

Careful scrutiny of these nominees reveals a pattern of insensitivity to the most vulnerable among us, including the mentally disabled, women victimized by violence, prisoners, children exposed to unsafe products, injured workers, and gays and lesbians. Some are outspoken opponents of reproductive rights and the separation of church and state, while at least one nominee has been a long-standing member of a discriminatory private club. In short, there is a record of protecting corporate and well-heeled interests and a striking lack of familiarity with, much less compassion for, the less privileged among us.

Whatever happened to Bush's campaign promises that he was to be a consensus-builder, committed to compromise and cooperation? Just as the Bush administration continues to offend our allies abroad with repeated threats of "my way, or the highway," its arrogance at home is reflected in his slate of extremist nominees to the federal bench.

Enormous political pressure is heaped on those committee members who resist rubber-stamping the president's nominees. We — the rest of the Senate and their constituents — must support those members. Too much is at stake — for decades to come especially for the most vulnerable Americans.

Affirmative Action:

▼ *continued from page 4*

inartfully drafted, but seems to apply to **rehearings** *en banc*, not initial hearings *en banc*). Moreover, the rules permit any judge to request a poll to determine whether an appeal should be heard *en banc*, whether a party had requested it or not; no judge did. Indeed, Judges Boggs and Batchelder, the two judges who endorsed the procedural appendix, did not vote to hear the case *en banc*, which operates as a negative vote, so these judges object to Chief Judge Martin's failure to give them a timely opportunity to support something which they in fact opposed.

Another aspect of Judge Boggs' argument was remarkable. He contended that the two senior judges would have been on the *en banc* court if a vote had been held earlier because of a now-repealed local rule permitting senior judges to serve if they were active "at the time a poll was requested." However, as Judge Boggs' acknowledged, a federal statute provides that "[a] court in banc shall consist of all circuit judges in regular active service." Therefore, Judge Boggs' complaint is that his colleagues wrongfully arranged for the *en banc* court to be constituted in compliance with the law, including only active judges.

While a petition for *certiorari* has not yet been filed, presumably the claimed procedural irregularities will be advanced as an additional reason for the Supreme Court to review the decision. Of course, there is already a circuit split and the issue is of extreme importance, so it seems likely that at some point the Supreme Court will take an affirmative action case. In the original *Bakke* case, Robert Sedler, Howard Lesnick and Arval Morris filed an amicus brief on SALT's behalf. (See the article by Robert Sedler on page 5 of this issue.) SALT will prepare and file an amicus brief in this case. If you are interested in working on the brief, email Margaret Montoya, montoya@law.unm.edu, or Jack Chin, Jack.chin@law.uc.edu, co-chairs of the affirmative action committee.

Solomon:

▼ *continued from page 2*

military recruiters equal access to the campus. This provision is potentially broader than the current Solomon Amendments, which provide for a cutoff of funds (other than student loans) for schools that prohibit or prevent access. In the analysis developed by SALT, one issue is unlawfulness, which goes beyond denial of funds, and which could be understood to trigger various unspecified enforcement mechanisms. Another is whether the proposed language increases the obligation by changing the statutory language from "prohibit or prevent" to "equal access". We have recommended either eliminating the provision or amending it to allow for actions by institutions in furtherance of an antidiscrimination policy.

Once we got their attention, the Human Rights Campaign folks looked over the bill. They read it differently but agreed that it could be problematic. HRC's reading focused on the definitional scope of institutions involved: those that receive

Solomon *continued on page 14*

Bar Exam:

▼ *continued from page 8*

school curricular and admissions policies. With an eye on the bar exam, students choose their courses based on what is emphasized on the bar exam rather than on what actually interests them or prepares them for the practice of law. This translates into high enrollment in courses tested on the bar and reduced enrollment in clinical courses and subjects not tested on the bar exam such as poverty law, environmental law, and race and the law, to name just a few. The bar exam also drives admissions decisions as law schools attempt to admit a class most likely to pass the exam. This results in an over-reliance on the LSAT, at the expense of admitting students with a broader range of experience and perspective.

Finally, and most importantly, the statement describes the ways in which the bar exam stands as a barrier to greater diversity within the profession. The LSAC longitudinal study documented the disparity in pass rates, particularly for first time takers, but also for repeat takers. For all these reasons, SALT calls upon states to consider alternative ways to measure professional competence.

The statement will be sent to the SALT membership, law school deans, state courts, state bar examiners, and racial justice commissions. The statement will also be published in the *Journal of Legal Education*. If anyone would like additional copies of the Statement, contact Eileen Kaufman at eileenk@tourolaw.edu.

The committee is now engaged in planning a conference for the fall of 2003. The focus of this conference will be to move the discussion from a critique of the current bar exam to an exploration of new ways of licensing lawyers. Featured speakers will include experts on licensing and proponents of concrete alternatives to the existing bar examination. We anticipate an audience consisting of law school deans, bar examiners, and leaders of state and local bar associations. SALT members who are interested in working on the conference should contact Eileen Kaufman at eileenk@tourolaw.wsu.

Solomon:

▼ *continued from page 13*

funds under the 1965 Higher Education Act. Basically, an institution has a choice between receiving funds and allowing military recruiting on campus. But the funds involved include some of the student loan programs that were specifically protected from cutoffs in 1999. If the provision were to become law, the question would be whether the more recent, general provision in 10 U.S.C. Section 503 as amended would prevail over the protection of student loans contained in 10 U.S.C. Section 983. That is simply unclear. HRC is nervous.

Our first ally has been Carl Monk of AALS, who started this ball rolling back in the spring. Senator Mark Dayton (D-MN) has also been helpful. Now that Senator Levin and Congressman Frank are involved, we hope that this provision will be eliminated or clarified. We still have to negotiate the fix, and to see whether we can get both the apparent reincorporation for student funds and the equal access provisions eliminated. It ain't over 'til it's over, but it looks as though our efforts will be able to preserve the status quo on military recruiting.

On to the next, as they say in square dancing. Late summer and fall projects include two mailing projects. First, we want to revise and send out the survey on amelioration. We are a bit behind schedule because of the lobbying work, but hope to get it out in early fall to law school administrations. Second, the excellent SALT amelioration brochure should be sent around again in the early fall. Two other projects — the collection of amelioration narratives, and the development of a policy proposal on antidiscrimination in loan forgiveness programs — will also receive some attention this fall.

Please contact Committee Chair Marc Poirier to help with any of these efforts: poiriema@shu.edu or 973-642-8478.

Teaching:

▼ *continued from page 1*

Professor of Public Interest Law, Legal Ethics and Political Science at the University of Southern California Law School. Professor Chemerinsky argued the petitioners' case in the suit brought by the Coalition of Clergy, Lawyers and Professors to challenge the treatment of Afghan prisoners held incommunicado at Guantánamo Bay.

The luncheon presentation will be followed on Friday afternoon by a workshop on **"Creative and Collaborative Pedagogy in Response to Crisis."** The presenters in this workshop will discuss their ideas for developing a system for quick, collaborative course development so that law professors can immediately respond to (and incorporate legal issues raised by) current crises in their teaching. The audience will then form breakout groups to strategize and organize the planning of specific courses on specific topics. Look for an upcoming e-mail to SALT members, seeking expressions of interest in working on courses addressing various topics. Confirmed presenters at this workshop include: Phoebe Haddon (Temple) and Marnie Mahoney (Miami).

On Saturday the 12, a panel on **"Contextualizing Recent Events within International Law"** begins at 9 a.m. The purpose of this panel is to place the United States' "war on terrorism" in Afghanistan and the crisis in the Mid-East within the context of international law, exploring the role of politics and power in interpretations of international accords. Look for the list of speakers for this panel on the SALT Web site and in the conference brochure that will be mailed to SALT members early in the fall.

Following the panel on international law will be a panel entitled, **"Placing the 'War on Terrorism' in Historical Context (or, What We Haven't Learned from History)."** As the title suggests, this set of presentations will attempt to place the crises of the last year in historical context, reviewing the legal history of events such as the McCarthy era and the Japanese internment. Confirmed speakers include: Devon Carbado (UCLA), Carol Chomsky (Minnesota), Eric Freedman (Hofstra) (moderator), and Oren Gross (Minnesota).

The conference will close on Saturday afternoon with an important final event, a roundtable discussion entitled, **"Avenues to Authentic Peace—The Role of Progressive Law Professors."** This is an open forum where we hope to bring together those who are activists and advocates for peace in the Middle East and elsewhere and those who believe that military actions in such areas are justified. Our intention is to create a space where members of SALT and participants in the conference can listen to the opinions of others, defend their own positions, review the facts about the conflicts — those that are acknowledged to be true as well as those that are contested — and explore the strategies that can or should be used to achieve an authentic peace. Details about participants in this conversation are posted on the SALT Web site, and will be available in the conference brochure.

For further information, contact Deborah Post (deborahp@tourolaw.edu) or Nancy Ehrenreich (nehrenre@mail.law.du.edu). Additional details about the conference, as well as registration materials, will be mailed to SALT members early in the fall, and are posted on the SALT Web site.

This SALT conference is open to all legal educators. Please mark your calendars now, and plan to attend this informative and important SALT teaching conference.

Presidents' Column:

▼ *continued from page 1*

greater restrictions on the civil rights and liberties of U.S. citizens and immigrants, and proposed to combine diverse government agencies under one department.

While we recognize the need for national security, SALT has opposed many of these measures because they emphasize more violence and loss of life, rather than stress constructive, nonmilitary solutions to complex issues. In the Middle East, the continuing Israeli-Palestinian violence concerns us, as well. We also question the proposed U.S. "first strike" action against Iraq, which, without compelling evidence or public debate, appears indistinguishable from simple aggression.

Since September 11, the USA Patriot Act was signed into law, and the FBI assumed greater investigative powers without Congressional deliberation or public discussion. With these provisions, the broader reach of law enforcement extends into the lives of all Americans, not just those suspected as terrorists. With a relaxed standard of proof, surveillance and detention can occur without adequate judicial oversight. SALT registered its opposition to this legislation in a joint petition signed by various organizations concerned about the threats to civil rights and liberties implicated by these measures. In addition, with the assistance of our Public Positions Committee, chaired by Joan Howarth, we expressed our concerns to Attorney General Ashcroft regarding the expanded authority of local police agencies to enforce immigration laws (See article, page 7).

Similarly, we are skeptical of the massive government reorganization currently being considered in Congress. Such consolidation may exacerbate, rather than rectify the long-standing communication difficulties between law enforcement and national security agencies which have been revealed in recent months and may further erode citizens' rights.

The days following September 11 presented a powerful, albeit anguished educational opportunity for our students and us. However, this moment also was fraught with possibilities for greater misunderstanding and divisiveness, particularly in a climate that discouraged alternative views. We do not profess to have all the answers to these dilemmas. However, we are convinced that viable paths to peace have not been fully explored. Therefore, SALT seeks to contribute to this effort by providing a forum for sharing information and ideas about the ways to peace and for teaching in times of crisis. Our fall teaching conference, "Teaching in Crisis, Teaching about Crisis: Law, Peace and Pedagogy," will be held October 11–12 at Fordham Law School in New York City. We are pleased to collaborate with Fordham, Touro College Law Center, New York Law School, and other area law schools in this important effort. We look forward to seeing you there. (For further conference details, see article, page 1.)

Fall Teaching Conference:

Teaching in Crisis, Teaching about Crisis: Law, Peace and Pedagogy

October 11–12

Fordham Law School

We also have made significant strides in our efforts to maintain diversity and accessibility in legal education and the profession. We were pleased with the Sixth Circuit Court of Appeals decision in *Grutter v. Bollinger*, which was issued in May. The Sixth Circuit upheld the constitutionality of the University of Michigan Law School's admissions policy permitting consideration of race to achieve a diverse student body. SALT supported the student intervenors in this case. The bitterly divided 5–4 decision undoubtedly will be appealed to the United States Supreme Court, and SALT will be there to defend affirmative action, as we did in the Bakke case a generation ago. (See articles, pages 4–5.)

Our Judicial Nominations Committee has been extremely busy, given the extremist nominees forthcoming from the Bush Administration. In May, Michael Rooke-Ley, along with Bob Dinerstein and Norman Stein, represented SALT in Washington, D.C. at the Alliance for Justice's "Professor Lobby Days," during which we briefed Senate Judiciary Committee staffers on our concerns regarding the current slew of nominees. In June, SALT Board member Beto Juarez drafted a thorough and detailed report on ethics concerns involving Priscilla Owen of Texas, a Karl Rove protege and highly controversial nominee to the Fifth Circuit Court of Appeals. Thank you, Beto! In the coming months, more and more nominees will be having hearings, and we need the help of SALT members in researching their backgrounds and raising red flags when necessary. Please volunteer!

The SALT Bar Examination Committee has completed a statement on the inefficacy and inequity of state bar exams. We are especially grateful to primary author Andi Curcio and committee chair Eileen Kaufman for their efforts in drafting, editing, and circulating the statement. Through careful analysis, SALT has concluded that bar examinations do not effectively measure professional

Presidents' Column *continued on page 16*

Presidents' Column:

▼ *continued from page 15*

competence and hinder greater diversity in the profession. Our Statement on the Bar Exam will be distributed to deans, state supreme courts, state bar examiners, racial justice commissions, and SALT members. In addition, it will be published in a forthcoming issue of the *Journal of Legal Education*. We encourage you to have serious discussions about the bar exam in your law schools and among your state bar committee colleagues. (See article, page 8.)

Led by our hard-working committee chair, SALT continues to monitor the status of the Solomon Amendment and law schools' efforts to counter its exclusionary provisions on the basis of sexual orientation. (See article, page 2.)

And in response to incidents of racism and anti-Semitism at Harvard Law School last April, SALT requested information on anti-discrimination policies and multicultural affairs offices at our nation's law schools to support resolution of these difficulties. We are grateful to so many of you who responded with useful information. In order to provide broader assistance in such circumstances, we have initiated a project to devise a best practices action plan for addressing racism and similar offenses at law schools. We hope that this handbook will help institutions respond constructively to the safety and educational needs of all members of the affected law school community. We hope that you will continue to assist in this important effort.

Also on the matter of diversity in legal education, we are constructing a faculty diversity survey along the lines of our salary survey. While the effort may be complicated and even controversial, we believe that it is important to readily identify law schools having substantially diverse faculties, as well as those that do not, and to give prospective students a more relevant picture of law schools than that presented by the *U.S. News and World Report rankings*. (See article page 9.)

Finally, we are delighted to announce that we have selected the first Norman Dorsen Fellow to assist us in carrying out SALT's ambitious agenda. John Branam is a second-year law student at the University of Oregon who shares SALT's vision for legal education and the legal profession. John is a former Peace Corps volunteer in South Africa and the program manager for an educational nonprofit organization in Washington, D.C. In law school, he serves as vice-president of the Black Law Students Association, is a Wayne Morse Fellow, and is a Derrick Bell Scholar.

We are enormously grateful to founding member Norman Dorsen for his generosity in making this position possible. Beginning in 2002 and for the next four years, Norman has pledged $12,500 annually on condition that this amount be matched through SALT's own fundraising efforts. Of the $25,000 raised each year, $20,000 will earn interest in a special fund, while $5,000 will be used to pay the Fellow. At the end of five years, the fund will have accumulated more than $100,000, and the interest earned each year will sustain a Fellow thereafter. Sylvia Law has taken on the primary responsibility for raising the matching funds and has found the task more difficult than any of us had predicted. We want to thank those who have so generously contributed to the Norman Dorsen Fellowship Fund and encourage the rest of you to join in this important effort.

Once again, welcome to the new academic year. We wish you a year that is personally and professionally satisfying and productive. Our work at SALT is as necessary as ever, and we hope that you are invigorated to participate in our upcoming activities and projects. As always, let us hear from you with your thoughts and suggestions. We will go forward, together.

Bakke:

▼ *continued from page 5*

admissions policies were first adopted by law schools and medical schools in the middle and late 1960s, there was no concern about "racial diversity" in the classroom. Rather the concern was with the woeful lack of minorities in law, medicine, government, the business world, and the other important areas of American life. At the time of *Bakke*, no more than 2 percent of the lawyers in this country were African-American, and the representation of Hispanic-Americans and Native-Americans was even lower. There were many fewer lawyers than there are now, so the number of minority lawyers overall was very small. (In the early '70s, when I was at the University of Kentucky, there were no more than 20 African-American lawyers in the entire state, which had a 7 percent black population, and most of them were in marginal practice situations). The same situation prevailed in the medical profession and in all other important areas of American life.

In order to increase the representation of minorities in the legal and medical professions, it was absolutely necessary to adopt race-conscious admissions policies. For reasons directly traceable to the long and tragic history of racial discrimination in this nation, there was an enormous economic gap between racial minorities as a group and whites as a group, which in turn lead to a racial educational gap. This unpleasant and undisputed fact, coupled with the fact that in the aggregate there were many more white applicants than minority applicants at a particular law school or medical school, meant that if race were not affirmatively taken into account in the admissions process, relatively few minority students would have been admitted at most law schools and medical schools. This was the stark reality of the situation at the time of *Bakke*.

Bakke *continued on page 17*

Bakke:

▼ *continued from page 16*

We argued first that in light of the underlying values of the Equal Protection Clause, it was constitutionally permissible for law schools and medical schools to take race into account in determining admission:

> The limited, non-stigmatizing use of racial criteria by the Davis medical school in its special admissions program is directly related to advancing the valid state interest in alleviating the serious shortage of minority physicians, and similarly, the limited use of racial criteria by law schools in their special admissions programs is directly related to alleviating the serious shortage of minority lawyers. The promise of [the] value of the 'promise of freedom' in the Wartime Amendments has been consistently recognized by this Court [citations omitted]. When the state acts to alleviate the serious shortage of minority physicians and lawyers, it is acting to make the 'promise of freedom' a reality for blacks and for other racial-ethnic minorities, such as Chicanos, Puerto Ricans and Native Americans, who like blacks, have been subject to extreme victimization and discrimination solely because of the color of their skin. Its use of racial criteria for this purpose, therefore, advances a valid state interest. Since this is so, the use of racial criteria does not amount to invidious racial discrimination and is not as such unconstitutional.

"...there was an enormous economic gap between racial minorities as a group and whites as a group, which in turn lead to a racial educational gap."

We went on to show why it was necessary to take race into account in determining admissions to law schools and medical schools:

> The reason why strict reliance on comparative objective indicator scores will result in the substantial exclusion of racial minorities from the limited number of available places in medical schools and law schools today relates to the cumulative effects of racial discrimination and victimization on racial minorities as a group in American society. Racial minorities as a group will perform less well in regard to objective academic indicators when compared to whites as a group *because racial minorities as a group have received substantially less benefit from primary and secondary education in this country than have whites as a group*. The fact that they have received substantially less benefit from primary and secondary education in comparison to whites results from the racially segregated nature of public education in this country, coupled with the substantially higher incidence of poverty among racial minorities as a group.

We also emphasized that the minority students admitted under affirmative action programs were fully qualified and would be subject to the same educational and professional standards as white students:

> It must be emphasized that the minority students who are admitted under the special admissions program are, in the opinion of the admitting authorities, fully qualified to complete the course of study, and in fact, the great majority of them do so. They are subject to the same standards of academic performance as the students admitted on the basis of comparative objective indicator scores, and are subject to the same state examination and licensing requirements. As a result of these special admissions programs, in recent years there has been some slight increase in the number of minority physicians and lawyers, and a start toward alleviating the serious shortage of minority physicians and lawyers in this country has at last been made.

"When the state acts to alleviate the serious shortage of minority physicians and lawyers, it is acting to make the 'promise of freedom' a reality for blacks and for other racial-ethnic minorities."

The heart of our argument was expressed as follows:

> What the Constitution does not prohibit is the use of racial criteria in certain circumstances, necessarily few in number, where such use advances a

Bakke *continued on page 18*

Bakke:

▼ *continued from page 17*

valid state interest. And one of these circumstances most clearly is where the use of racial criteria is necessary to overcome the present consequences of a history of racial discrimination directed against racial minorities, consequences that are reflected both in a serious shortage of minority physicians and lawyers, and in the unlikelihood, given the realities of the admissions situation interacting with those consequences, that a reasonable number of minority applicants will be admitted to professional schools today if race is not taken into account.

We thus argued that the Davis special admissions program should be upheld as constitutional in all respects.

The race-conscious admissions programs of the mid and late '60s were the next stage in the civil rights movement. Once formal barriers to racial equality were held unconstitutional and civil rights laws were enacted, it was necessary to turn our attention to remedying the consequences of the long and tragic history of racial discrimination. In light of the realities existing at that time, adherence to racial neutrality would only perpetuate those consequences and we would not be much further along to achieving true racial equality in American society. Race-conscious admissions programs in law schools, medical schools, and elsewhere in the university were designed to bring about the *equal participation* of racial minorities in the professions and in all important areas of American life.

It was my view at the time that many law schools and medical schools were ambivalent about affirmative action. They were willing to take race into account only within the framework of an admissions process based primarily on comparative objective indicator scores. I feared that if they were not permitted to take race into account, they would not be willing to use "factors that correlate with race" to bring about the admission of a substantial number of minority students. Rather they would have been likely to say, "We tried to admit minority students, but the courts wouldn't let us, so its not our fault that there won't be many minority lawyers or doctors in the future."

It is also my recollection that in *Bakke*, neither the lawyers for Davis nor for the supporting *amici* tried to justify affirmative action in terms of "racial diversity." The traditional civil rights groups such as the NAACP considered the argument demeaning to minorities. It sounded too much like, "We want to admit minorities not for their own sake, but only because they will be helpful in providing a better education for our white students." Instead the justifications for affirmative action in the SALT brief and in many other briefs were primarily in terms of overcoming the present consequences of societal racial discrimination, and were reflected in the Brennan opinion in *Bakke*. But once Powell cast the deciding vote in terms of "racial diversity," thereby preserving affirmative action, good lawyering dictated espousal of that rationale. Howard Lesnick wrote a very important law review article, "What Does *Bakke* Require of Law Schools," and the law schools could use that article to tailor their admissions programs to comply with the Powell opinion in *Bakke*.

"When it comes time to defend affirmative action before the Supreme Court, I think it is important that we not lose sight of the real purpose of affirmative action: to increase the participation of racial minorities in all important areas of American life."

Looking to the purpose for which affirmative action programs were adopted in the mid- and late-'60s, it cannot be doubted that affirmative action has been a success. Today, the number of minority lawyers has substantially increased, and the legal profession is much more representative of American society than it was a generation ago. Minority lawyers are in a position to make the legal system more responsive to the needs of minority persons, and to build the confidence of minority persons in the legal system and the administration of justice precisely because minority lawyers are an integral part of that system. Similarly, with more and more minority persons graduating from college and from professional and graduate schools, we have seen a marked increase in the number of minority doctors, minority professors, minority executives and the like. While we still have a long way to go, we are now moving in the direction of a truly diverse society, in which racial minorities will be full and equal participants with whites in all important areas of American life. Also, as a result of affirmative action, we have seen an increase in the size of the minority middle class.

When it comes time to defend affirmative action before the Supreme Court, I think it is important that we not lose sight of the real purpose of affirmative action: to increase the participation of racial minorities in all important areas of American life. Our focus should not be so much on diversity in the classroom as on diversity in American life. And perhaps some of the ideas that we advanced in the SALT *Bakke* brief a generation ago will find their way into the new SALT brief as SALT defends affirmative action in the 21st century.

SALT Membership Thriving

Fran Ansley, University of Tennessee School of Law

The SALT Membership Committee is happy to report that membership in the organization is presently at an all-time high. Well over 600 people have paid SALT dues for academic year 2001–2002, a 40 percent increase above the previous high count for any single year. Counting all those who paid dues over the past two academic years yields a total of close to 800 members, also a new record for any two consecutive years.

We are pleased with these numbers because they demonstrate the current vitality of our veteran organization. More importantly, we believe there has never been a time when progressive law teachers, their students, and the communities that they serve more urgently needed strong networks. These are times when justice-minded people should be in close touch, sharing information, devising strategies, defending and working with groups that are working for peace and justice, and raising voices of dissent against many of the policies and practices of those who have gained the reins of power. SALT can be an important part of such an effort.

We ask all readers of this newsletter to help us boost our strength in numbers even higher. Please join SALT if you are not already a member, promptly renew your membership this fall if you are already a part of the organization, and urge your new and old colleagues to do likewise.

We also encourage all members of the organization to become active in one or more of SALT's many substantive programs, each of which could use your energy and critical support. For a list of "Ten SALT Projects Needing You," send an e-mail message to Fran Ansley at ansley@utk.edu.

How Can We Help?

SALT will come to you! Let us know if we can be helpful in discussions or programs at your institutions about equal access and diversity in legal education and the profession and other justice issues. Contact us to have the co-presidents or other board members participate in such efforts. We are committed to your interests and needs. Paula C. Johnson, pcjohnso@law.syr.edu, and Michael Rooke-Ley, union2757@aol.com.

Society of American Law Teachers

Membership Application (or renewal)

❒ Enroll/renew me as a Regular Member. I enclose $50 ($35 for those earning less than $30,000 per year).

❒ Enroll/renew me as a Contributing Member. I enclose $100.

❒ Enroll/renew me as a Sustaining Member. I enclose $300.

❒ I enclose_____($100, $150, $200, or $250) to prepay my dues for _____ years ($50 each year).

❒ Enroll me as a Lifetime Member. I enclose $750.

❒ I am contributing $_____ to the Stuart and Ellen Filler Fund to support public interest internships.

❒ I am contributing $_____ as an additional contribution to support SALT's promotion of affirmative action.

Name _____ School _____

Address _____ E-mail _____

_____ ZIP Code _____

Make checks payable to: Society of American Law Teachers

Mail to: Professor David F. Chavkin
Washington College of Law
American University
4801 Massachusetts Ave. NW
Washington, DC 20016

www.saltlaw.org

WILLIAM MITCHELL COLLEGE OF LAW
875 Summit Avenue
Saint Paul, MN 55105-3076
www.wmitchell.edu

SALT Equalizer
Professor Eric S. Janus, Editor

3

[redacted]