

# The **EQUALIZER** **SALT**

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Society of American Law Teachers

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## **ENGLISH-ONLY RULES: SALT CONVINCES THE SOLICITOR GENERAL, BUT NOT THE HIGH COURT**

— Juan F. Perea  
*University of Florida  
College of Law*

During its June meeting, the SALT Board decided to take a public position on the issue of language discrimination in the workplace. The issue arose in the case of *Garcia v. Spun Steak*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, — U.S. — (1994). Prior to denying certiorari, the Supreme Court invited the Solicitor General to file a brief in the case stating the position of the United States Department of Justice. The Board decided to write to the Solicitor General on behalf of SALT.

This case presented an important opportunity for the Court to consider the scope of protection provided by Title VII's ban on discrimination because of national origin. In *Spun Steak*, the Ninth Circuit decided that an employer's English-only rule, which prohibited bilingual employees from speaking Spanish while working on a meat production line, did not violate Title VII. Several other cases have presented the same issue, but the Court has always denied certiorari and, in one case, vacated the decision as moot.

The Board, on behalf of SALT, requested the Solicitor General to urge the Court to grant certiorari and to overturn the ruling in the Ninth Circuit for several reasons. First, the operation of English-only rules enables employers to discharge persons whose primary language is not English merely for speaking their primary language, even under circumstances in which the use of the non-English language does not interfere with job performance. This result is terribly unfair to millions of Americans. According to the 1990 Census, approximately 31.8 million persons over the age of five, about fourteen percent of the total popula-

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*President's Column . . .*

## **TALKING SEX IN THE CLASSROOM**

— Jean C. Love  
*University of Iowa  
College of Law*

As I was teaching Constitutional Law II for the first time this summer, I found myself supplementing the casebook in order to incorporate gay and lesbian legal issues into the classroom discussion. The student response was enthusiastic. It then occurred to me that SALT members — particularly those who teach Constitutional Law — might enjoy thinking about these issues. So this will be the first of several co-presidents' columns on the development of liberty, equality and first amendment rights for gays, lesbians and bisexuals. In addition to discussions by the United States Supreme Court, I will refer to decisions by state and lower federal courts because they are often on the "cutting edge" of the law.

In this column, I want to focus on the question of whether sodomy statutes are in violation of a

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## SALT BOARD MEETS IN WASHINGTON

—Joyce Saltalamachia  
*New York Law School*

Thirteen members of the SALT Board, plus several SALT general members and guests, convened in Washington at the District of Columbia School of Law on May 6 to discuss SALT activities, past, present and future. Intrepid Board members had travelled from nine different states, mostly along the northeast corridor but some from as far as Iowa, Wisconsin and Florida. The SALT Board meets three times a year with one meeting always at the AALS annual meeting and the other two generally alternating between the East and the West coasts. Members are always welcome.

On behalf of the Membership Committee, **Cynthia Bowman** reported that our membership is now at 827. We have been conducting a membership drive to enroll more adjuncts and law librarians, and we expect that this drive will continue into the next school year. (See Cynthia's report, page 14 herein.) Although long-time Treasurer **Stuart Filler** was not present at the meeting (there was mention of Cancun), he sent along a detailed Treasurer's report indicating that SALT is in healthy financial shape and thus able to continue providing modest support to some of the important events and activities nationwide which are consistent with SALT's mission.

**Sylvia Law** and **Rand Rosenblatt**, co-chairs of the Access to Justice, Discrimination and Health Care Reform Committee, reported to the Board that the Committee has been active on a number of fronts. On January 31, 1994, Sylvia and Rand delivered fifty-three pages of testimony to the Health and Environment Sub-committee of the Energy and Commerce Congressional Committee. Many SALT members had participated in compiling this testimony on consumer protection and discrimination issues. Rand reported that he has continued to work with the Congressional Committee and has been corresponding with the Committee staff on various aspects of the Health and Security Act. (See his article on page 5 herein.) Sylvia reported that she has been working with the Bar Association of the City of New York for endorsements of the SALT position on the Act. Rand and Sylvia asked for SALT participation in the future of the Health and Security Act. They stated that the SALT Committee makes an important contribution. There are many other groups with an interest in this subject

but without the specific expertise which the SALT Committee can provide. They recommended keeping in touch with these other groups and exploring future relationships. Rand stated that the SALT Committee is particularly concerned with creating a role for advocacy in the Act and that the Committee is looking at making a concrete proposal to develop a good, fair administrative process for claims. The Board agreed to endorse the work of the Committee and to financially support its continuing activities. Sylvia spoke of the possibility of SALT using some of its allocation to get people to brainstorm together about consumer participation, alternative dispute resolution and rights resolution, perhaps in the form of a summer working group. The Board enthusiastically endorsed this proposal.

Teaching conference co-organizer **Carol Chomsky** reported to the Board plans for the September conference in Minnesota. Although this conference is partially modeled after our prior two successful conferences, it will be longer and will have additional working groups for extra subject specialties. (See pages 8 through 10 herein.)

**Nan Aron**, Executive Director of the Alliance for Justice, appeared at the Board meeting to discuss plans for this fall's "Access to Justice" national conference and related regional conferences. Nan, who has attended many SALT Board meetings to report on Alliance projects, discussed the origin of the idea for the "Access to Justice" conference. She characterized this conference and the regional conferences as efforts to start a national activist organization. She noted that

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*"... SALT is in healthy financial shape ..."*

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activist and progressive groups have not been able to function on a national level as cohesively and as effectively as, for example, the conservative Federalist Society. The Alliance hopes that the publicity and enthusiasm gained from this conference will inspire law students to go into public interest law and will address the need for a progressive jurisprudence. The regional programs are designed to meet local issues and local needs, and there will be a satellite link between the national program and regional ones. SALT members have been working on the organization of the regional programs and have been partici-



pating in designing the national conference as well. She encouraged SALT members to write short articles and papers for the day and to submit them to her for publication. SALT members can expect further information about regional activities. (See page 5 herein.)

The Board also discussed future SALT involvement in certain areas of public interest and legal policies. **Ann Shalleck**, **Cynthia Bowman** and **Homer La Rue** were appointed to draft a letter on behalf of SALT to the Department of Education protesting its cutback of funding for clinical pro-

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*"... SALT is concerned primarily with issues of legal education, but also has a natural concern with issues of social justice and First Amendment rights."*

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grams. **Juan Perea** was authorized to draft a letter urging the Supreme Court to grant certiorari for a case involving the constitutionality of firing employees for speaking a language other than English at work. Juan also spoke about future SALT involvement in the effort to change Title VII and the dismal state of language interpretation in the courts. (See his article on page 1 herein.)

**Arthur Leonard** discussed a recent success that SALT has had in the *Lloyd v. Grella* case. SALT had submitted an amicus brief in this case urging the court to follow the clear language of the regulation in New York State which would deny military recruiters access to campuses. The New York Court of Appeals accepted SALT's arguments and declined to look behind the words of the regulation. (See Arthur's article on this page.)

Any SALT member with a suggestion for a public issue appropriate for SALT concern should contact the Chair of the Public Positions Committee, **Zipporah Wiseman**. As a rule, SALT is concerned primarily with issues of legal education, but also has a natural concern with issues of social justice and First Amendment rights.

The next Board meeting will be held at the University of Minnesota School of Law on Saturday, September 26, at 6:00 p.m. immediately following the teaching conference. ■

## **NEW YORK HIGH COURT SAYS SCHOOLS CAN BAR MILITARY RECRUITERS; CONGRESSIONAL REACTION THREATENED**

— Arthur S. Leonard  
New York Law School

In a major victory for the policy-making autonomy of educational institutions, the New York Court of Appeals ruled May 3 in *Lloyd v. Grella*, 83 N.Y.2d 537, 634 N.E.2d 171, 611 N.Y.S.2d 799, that schools chartered by the state of New York may adopt non-discrimination policies barring discriminatory employers from their premises and apply such policies to the armed forces of the United States. SALT filed an amicus brief in the case, urging the ruling which was subsequently adopted by the court.

The case arose when the Rochester, New York, city school district voted to bar employers who discriminate on the basis of sexual orientation from recruiting at city schools. Military recruiters were immediately barred under this policy. **Jean Lloyd**, the mother of a Rochester city high school student, filed suit under New York Education Law § 2-a, which provides that any school chartered by the state of New York that allows employers to recruit on its premises must provide access "on the same basis" to military recruiters. Lloyd argued, and the lower courts agreed, that § 2-a indicated the legislature's intent to outlaw all bans on military recruitment.

The Court of Appeals disagreed, accepting the school board's argument that a non-discrimination policy applied uniformly to all employers constitutes access "on the same basis" within the plain language of the statute. Writing for the court, Judge **Joseph W. Bellacosa** held that the statutory language was clear, thus resort to legislative history was unnecessary. Bellacosa asserted that the statute

specialty protects military recruiters by granting them equal access. It does not correspondingly divest local school boards of their traditional discretionary powers to adopt protocols barring stated discriminatory policies and practices such as are at issue in this case. The use of the phrase "on the same basis" in Education Law § 2-a is synonymous with "equal access", not unqualified access... [The policy] at issue here bars access to all recruiters when they fail to meet specified cri-

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teria tailored for the Rochester school system. The fact that it significantly targets a concededly discriminatory entity does not divest it of its uniform applicability.

While holding that clear language did not require resort to legislative history, Bellacosa reviewed the history and concluded it was consistent with the court's holding, finding that the proponents of the bill insisted that they were seeking equal access, not special access, for the military. "Plainly, when school board policymakers exclude recruiters 'on the same basis,' like those who statedly discriminate against homosexuals, the statute's special admittance pass for the military is not operative. It does not override the evenhanded exclusion of all employers who proclaim their discriminatory policies."

The decision cites and is consistent with *Doe v. Rosa*, 1993 WL 522124 (N.Y. Sup. Ct., Nov. 17, 1993), in which a trial judge ruled that the law school at State University of New York at Buffalo was required by Governor Cuomo's Executive Order 28 (banning sexu-

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*"... SALT filed an amicus brief in the case, urging the ruling which was subsequently adopted by the court."*

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al orientation discrimination by the state government) to exclude military recruiters from its placement office. The trial judge held that § 2-a, to which the law school was subject, was not violated by this ruling, a holding confirmed in *Lloyd*. AALS by-laws and regulations require law schools to exclude recruiters, such as the military, who discriminate based on sexual orientation.

In addition to SALT, others filing amicus briefs in support of the Rochester school board included the Association of American Law Schools, the New York State School Boards Association, the American Civil Liberties Union, the Lambda Legal Defense and Education Fund, and the Association of the Bar of the City of New York's Committees on Lesbians and Gay Men in the Legal Profession and Sex and Law. (Incidentally, one of the law teachers who worked on the SALT amicus brief, Prof. Deborah Batts of Fordham Law School, was sworn in as a U.S. District Judge for the Southern District of

New York on June 23rd!)

*Lloyd* is not the end of this story, however. U.S. Rep. Gerald Solomon (R-N.Y.), whose district is in western New York, was already outraged by the *Doe v. Rosa* opinion compelling SUNY-Buffalo to exclude

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military recruiters. Now, after *Lloyd v. Grella*, Solomon has succeeded in attaching an amendment to a Pentagon funding bill that would deny defense research funds to schools that bar military recruiters and has announced his intention to attach such amendments to every appropriations bill that provides funding for higher education. "We're going to try to attach it to everything," said Solomon, according to a June 28 article in *USA Today*. "If they want to espouse that philosophy, that's fine. But they should not be eligible to receive Defense Department funds if they do." Similar legislation has been on the books for more than a decade, but the Defense Department has never done more than threaten to cut off funds to any school where significant defense research is being done. At this writing, it is uncertain whether Solomon's amendment will make it into the final appropriations bill, although it has already survived votes in both houses of Congress. ■

## REMINDER: SALT Board Meeting

Saturday, September 24, 1994

6:00 p.m.

Following the Teaching Conference

University of Minnesota

Minneapolis

Members always welcome.



## SALT's HEALTH REFORM COMMITTEE CONTINUES ITS STRUGGLE AGAINST VESTED INTERESTS

— Rand E. Rosenblatt  
Rutgers University  
School of Law, Camden

The SALT Committee on Access to Justice in Health Care Reform, which I co-chair with Sylvia A. Law of New York University School of Law, is continuing to do active work on consumer rights and antidiscrimination issues in federal health care reform. Expanding my January testimony, I sent detailed letters in March and May to Congressman Henry Waxman and congressional staffers about: (1) the need to notify consumers that an appeals system exists and how to use it; (2) the need for health plans to explain to consumers decisions denying coverage or services; (3) the importance of organizational independence and adequate resources for consumer advocacy; (4) why the burden of proof should be placed on health plans seeking to deny coverage with respect to medical necessity and practice guidelines; (5) why the egregious ERISA preemption of state tort law regarding health care coverage decisions should be repealed, and (6) why it is important to retain a doctrine of informed consent based on the informational needs of patients rather than the views of doctors about what should be disclosed. I also had numerous conversations with congressional staffers on these issues.

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*"... profound hostility of powerful interest groups and their congressional allies toward consumers and toward principles of law and accountability."*

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Sylvia and I met with the SALT Board of Governors in Washington in early May and reported on these activities. The SALT Board offered its enthusiastic support and urged the Committee to continue and expand its efforts. The Committee has done so. For example, in late May Peter Shane, then a professor at the University of Iowa College of Law, now the new dean of the University of Pittsburgh School of Law, submitted a memorandum in response to a con-

gressional staff request explaining that it was important for health reform legislation to create private rights of action against federal officials in order to overcome restrictive Supreme Court interpretations of the federal Administrative Procedure Act. In June, I responded to an urgent request from the National Health Law Program and Senator Edward Kennedy's staff with a detailed letter and national advocacy effort explaining why health plans should not — as advocated by Senator David Durenberger — be granted discretion to deny services on grounds of medical necessity and appropriateness, with consumers having the burden of persuasion in a limited and poorly-defined appeals system.

The primitive nature of many of the above issues reflects the profound hostility of powerful interest groups and their congressional allies toward consumers and toward principles of law and accountability. The imbalance of political power is exacerbated by a chaotic legislative process in which years of advocacy, public hearings and expert studies are ignored while exhausted congressional leaders and staff try to cobble together poorly thought-out provisions that can sway a few critical votes. But, whatever the outcome, SALT's efforts to protect health plan consumers and to insure government accountability deserve our continued support. ■



## FIRST MONDAY IN OCTOBER IS PUBLIC INTEREST LAW DAY

— Jean DeStefano  
Alliance for Justice

"The First Monday in October" has a special meaning for the legal community this year. It is a day when law teachers, law students and public interest lawyers all across the country will be taking a fresh look at the workings of the legal system and discussing how to make it work better for people.

Many SALT members have been spending part of their summer organizing *First Monday* symposia. The local symposia, which will be linked by a 75-minute national program to be broadcast live from

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the nation's capital at noon EST, will take many forms, ranging from day-long conferences sandwiched around the national broadcast to brief seminars following the satellite presentation.

Among the individuals who have been invited to participate in the national broadcast are Justice **Harry Blackmun**; **Marian Wright Edelman**, director of the Children's Defense Fund; **Bryan Stevenson**, co-director of the Alabama Capital Representation Resource Center; **Tom Stoddard**, a leader of the gay rights legal movement; and **Harold Koh** of Yale Law School, who, with his students, represented the Haitian boat people in their litigation against United States policy. A diverse group of law students from around the country will be selected to participate with the public interest leaders on the national panel.

Other law teachers who are coordinating *First Monday* symposia are **Larry Yackle** (Boston U.), **Stephen Pinkus** (Yale), **Ellen Chapnick** (Columbia), **Susan Herman** (Brooklyn), **Nadine Taub** (Rutgers), **Binny Miller** and **Mark Hager** (American), **Steve Steinglass** (Cleveland State), **Dan Pollitt** (North Carolina), **Bill Quigley** (Loyola - New Orleans), and **Erwin Chemerisky** and **Judith Resnik** (USC). **Julie Shapiro** (Puget Sound) is representing the academic community on an organizing committee in Seattle. A committee headed by **Nancy Stohl** of the Public Interest Clearinghouse in San Francisco is organizing an event to be held at Stanford Law School. Among other SALT members who are planning seminars around the satellite broadcast at their schools are **Carol Chomsky** at Minnesota, **Ken Rosenbaum** at Touro, **Barbara Stark** and **Dean Rivkin** at Tennessee, and **Robert Batey** at Stetson. **Frank Askin** of Rutgers - Newark, a consultant to the Alliance for Justice, has been serving as national academic coordinator of the *First Monday* program.

For SALT members in areas where no *First Monday* program is yet scheduled, there is still time to organize one. The program is being coordinated by the Alliance for Justice in Washington, (202) 332-3224.

The Alliance has also solicited public interest lawyers to contribute short articles for a book to be titled "Lawyering for Change" and to be distributed on *First Monday*. Articles should be two or three double-spaced pages and recount stories of successful legal struggles on behalf of human rights, including new modes of providing legal services and innovative strategies and techniques for shaping legal relief. A

major purpose of the book and *First Monday* is to inspire law students to consider careers in public service. SALT members who would like to contribute to this anthology should contact **Frank Askin** at the Alliance for Justice. ■



## **SALT SUPPORTS ASIAN-AMERICAN LAW PROFESSORS' CONFERENCE**

— **Patricia A. Cain**  
*University of Iowa  
College of Law*

The first-ever conference for Asian-American law professors will be held this fall (October 13-15) at the Boston College Law School. Conference organizers are **Alfred C. Yen** (Boston College), **Pat K. Chew** (Pittsburgh), **Karl S. Okamoto** (Rutgers - Camden), and **Margaret Y.K. Woo** (Northeastern). The conference will focus on the emerging identity, interest and professional responsibility of Asian-American law professors. Panelists will also discuss the relationship between Asian-Americans and the dominant culture as well as the relationship between Asian-Americans and other minority groups. SALT congratulates the organizers for creating this conference, which will provide a much-needed arena for Asian-American law professors to share experience and ideas.

Over its twenty-year history, SALT has supported diversity in legal education in many ways. SALT has hosted numerous conferences on racism, sexism and homophobia in legal education. The recent and forthcoming SALT teaching conferences have included issues of race, sex, sexual identity, disability and poverty. In 1983, the SALT Board turned out in numbers to support the formation of the AALS Section on Gay and Lesbian Legal Issues. In 1989, when the Women in Legal Education Section planned an AALS program on Feminism and Contract Law, SALT stepped in to co-sponsor the program when the Section on Contracts refused to participate. In keeping with our ongoing support for the underrepresented, the SALT Board of Governors has pledged to cover travel expenses for three non-law Asian-American speakers at this first Asian-American Law Professors' Conference. ■



## SALT SEEKS NOMINEES FOR ANNUAL TEACHING AWARD

— Phoebe A. Haddon  
Temple University  
School of Law

Each January at the AALS annual meeting SALT hosts an awards dinner honoring a person who (or an institution which) has made an extraordinary contribution to the teaching mission of the legal academy. As chair of the Awards Committee, I invite you to participate in the identification of a candidate for this year's award. We are looking for a candidate whose teaching and other life's work exemplify a long-term commitment to issues significant and central to SALT's mission.

Past recipients of the SALT Teaching Award reflect the breadth of our interests and the diversity of the community we represent. They include Norman Dorsen, Cruz Reynoso, Mary Joe Frug (posthumously), Marilyn Yarbrough, Rhonda Rivera, University of Wisconsin, Howard Lesnick, Barbara Babcock, Clinton Bamburgh, CUNY Law School at Queens College, Derrick Bell, Herma Hill Kay, Charles Black, Arthur Leff, Harry Edwards, Ruth Bader Ginsburg, Rennard Strickland, Thomas Emerson, Charles Miller and David Cavers.

Help us to consider candidates you believe are most qualified for the award. A potential candidate may be well known or someone who has not received the recognition he or she deserves. Because the Awards Committee will report to the SALT Board at its fall meeting on September 24, 1995, I urge you to submit recommendations as soon as possible (and no later than September 12, 1994), including a statement as to why your nominee should be considered. You can write to me at Temple University School of Law, 1719 North Broad Street, Philadelphia, PA 19122.

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*“Members, please, take a few minutes to nominate a fellow law teacher whose work, in and out of the classroom, has inspired students and colleagues and who deserves SALT's recognition. Phoebe's fax: 215-204-5424.”*

— MRL ■

## NEW FILM FOR CLASSROOM USE: FOCUS ON ARTHUR KINOY

— Patricia A. Cain  
University of Iowa  
College of Law

Abby Ginzberg, lawyer and civil rights activist turned filmmaker, has produced and directed a new film entitled "Doing Justice," focusing on civil rights lawyer and law teacher, Arthur Kinoy. I have requested a copy to preview for SALT and for possible inclusion in a symposium we are planning at my law school in conjunction with the Alliance for Justice's *First Monday* symposia. Other SALT members may also be interested in the film.

The distributor's release contains the following description:

The 51-minute documentary takes us on a roller-coaster journey through some of the key civil liberties cases and social movements of the past four decades – the Rosenbergs and McCarthyism, the Civil Rights movement, the Vietnam War, government wiretapping, Watergate. At each stop, Kinoy, along with colleagues, judges and legal scholars, explains the constitutional issues at stake, discloses the creative legal strategies employed, and explores the interplay between the legal system and social justice.

The film includes recordings of Kinoy's actual arguments before the Supreme Court in two of his well-known cases, *Powell v. McCormack*, 395 U.S. 486 (1969) (attempted expulsion of Adam Clayton Powell from his seat in Congress) and *U.S. v. U.S. District Court for Eastern District of Michigan*, 407 U.S. 297 (1972) (ruling against Nixon Administration's practice of warrantless surveillance and wiretapping of dissenters).

The film is recommended for courses in Constitutional Law, Civil Rights, Federal Courts and Professional Responsibility. Student organizations committed to public interest lawyering should also find the film useful.

A video cassette of the film, "Doing Justice," may be purchased for \$195 plus \$10 shipping. Contact: California Newsreel, 149 9th Street, San Francisco, CA 94103; telephone: 415-621-6196; fax: 415-621-6522. ■



# SALT PRESENTS CONFERENCE ON DIVERSITY ISSUES

– Eric Janus  
William Mitchell College of Law

– Carol Chomsky  
University of Minnesota School of Law

The Society of American Law Teachers will present its third teaching conference on issues of race, class, gender, disability and other forms of diversity in the law school curriculum on Friday and Saturday, September 23-24, 1994, at the University of Minnesota in Minneapolis. Though on the same theme as the last two teaching conferences, the Minneapolis conference will offer significant new approaches to these important issues, building on what we've learned in past discussions. If you haven't yet attended one of these conferences, come find out why participants in the two earlier conferences found them to be such an exciting and affirming experience. If you have attended before, come back again — the program is designed to add to, not repeat, the insights and dialogue in New York and Santa Clara.

During the two-day conference, participants will work in subject matter groups, attend plenary sessions and work on cross-curriculum pedagogical issues.

## Subject-matter Working Groups

The heart of the conference will be participatory subject-matter working groups. These sessions will feature presentations and demonstrations by colleagues, as well as ample opportunity to discuss the doctrinal, pedagogical, practical and theoretical issues connecting issues of diversity with the subject matter area. By talking directly with those who teach in your own subject area, you can develop specific expertise and strategies for raising these issues in your own classroom. Subject matter areas and the names of persons coordinating each area are as follows:

Civil Procedure:  
Jeff Brand (San Francisco),  
Laura Dooley (Valparaiso)

Academic Support Program:  
Paula Lustbader (Puget Sound),  
Laurie Zimet (Santa Clara)

Environmental Law:  
Casey Jarman (Hawaii),  
Pat McGinley (West Virginia)

Family Law:  
Jane Aiken (South Carolina),  
Twila Perry (Rutgers, Newark)

Clinic:  
Beverly Balos (Minnesota),  
Richard Boswell (Hastings),  
Ann Juergens (William Mitchell)

Legal Writing:  
Deborah Schmedemann (William Mitchell),  
Bari Burke (Montana)

Constitutional Law:  
Mary Dudziak (Iowa),  
Judy Scales Trent (Buffalo),  
Ruth Colker (Pittsburgh)

Professional Responsibility:  
Marie Failingner (Hamline)

Property:  
Guadalupe Luna (Northern Illinois)

Torts:  
Steve Landsman (DePaul),  
Jody Armour (Pittsburgh)

Contracts:  
Deborah Waire Post (Touro),  
Joe Knight (Iowa),  
Tony Chase (Houston),  
Reginald Robinson (Howard)

Criminal Law:  
Phyllis Bookspan (Widener),  
Donna Coker (Stanford),  
Keith Harrison (Denver)

Tax:  
Denise Roy (William Mitchell)

## SUBJECT MATTER WORKING GROUPS



## Plenary Sessions

The conference will feature four plenary sessions. These sessions will broaden and deepen our understanding about teaching diversity issues by drawing on the experience of outstanding teachers who have thought — and taught — deeply about these subjects. The sessions, which are substantially changed from the format of prior conferences, are planned as follows:

### Theory in the Classroom and Clinic

This session will lay a foundation for discussion of how difference operates in our own substantive fields. It will introduce and explore recent scholarship exposing the deep structures of race, gender, disability and other forms of difference.

*Speakers:* Pat Cain (Iowa), John Powell (Minnesota) and Michael Perlin (New York Law School)

### The Experience of Talking Diversity

There is excitement, but also danger, when we raise issues of diversity in our classrooms. Politics, emotions, personal histories and the differences we and our students bring to the classroom all become part of our discussions. This session will focus on the problems and potentialities when we take the risks associated with addressing difference in our teaching.

*Speakers:* Okianer Dark (Richmond) and Fran Ansley (Tennessee)

### Teaching and Learning in a Diverse Environment

Many of our students who come from diverse backgrounds experience disempowerment and isolation in our classrooms, clinics and institutions. This session will address pedagogical and methodological approaches, especially those developed by Academic Assistance professionals, to help create a safe and collaborative learning environment where diverse students can thrive.

### Final Plenary

A final plenary session, led by Linda Greene (Wisconsin), will seek to draw conclusions and lessons for future action.

## Theater Presentation

A presentation of *The Rules of the Game*, a play about multiculturalism and diversity in law and law schools, has been tentatively arranged. It is presented by the Mixed Blood Theatre Company, a multicultural professional group in Minneapolis. The play will be followed by a discussion of the uses of dramatic and other non-traditional media to teach about diversity issues.

## Informal Presentations Invited

Law teachers who have developed teaching materials or lesson plans that include issues of diversity are invited to contact the coordinators for their subject areas to discuss the possibility of making an informal presentation sharing their work at the conference.

## Conference Schedule

### Friday, September 23, 1994:

- 8:00 a.m. Check-in and continental breakfast
- 9:00 a.m. Panel: Theory in the Classroom & Clinic
- 10:45 a.m. Subject-matter working groups
- 12:15 p.m. Box lunches
- 1:30 p.m. Panel: The Experience of Talking Diversity
- 2:45 p.m. Subject-matter working groups
- 4:30 p.m. Reception
- 6:00 p.m. Dinner
- 8:00 p.m. Theater presentation: Rules of the Game

### Saturday, September 24, 1994:

- 9:00 a.m. Panel: Teaching and Learning in a Diverse Environment
- 10:45 a.m. Break-outs: Pedagogy and Diversity
- 12:15 p.m. Box lunches
- 1:45 p.m. Subject-matter working groups
- 3:30 p.m. Wrap up: Where Do We Go From Here?
- 4:15 p.m. Adjourn

## Meals & Lodging

Conference registration includes continental breakfasts and box lunches on Friday and Saturday and dinner on Friday.

A block of rooms has been reserved at the Holiday Inn — Metrodome, which is a three-minute walk from the conference site. Please make your reservations directly with the hotel. Call 1-800-HIT-DOME. Reserve by 9/1/94 to ensure availability. (\$82 +tax single or double.) Shuttle service from the Minneapolis Airport is provided by Airport Express. Alternate: Days Inn, 2407 University Ave S.E., Minneapolis. 612-623-3999. A bit cheaper, but further away. Shuttle service to the conference site is available.

For further information, contact either of the conference coordinators: Prof. Carol Chomsky (Minnesota), 612-625-2885; or Prof. Eric S. Janus (William Mitchell), 612-290-6345.



**SALT TEACHING CONFERENCE: *DIVERSITY IN THE LAW SCHOOL CURRICULUM***

**FRIDAY AND SATURDAY, SEPTEMBER 23-24, 1994**

**UNIVERSITY OF MINNESOTA SCHOOL OF LAW, MINNEAPOLIS**

**REGISTRATION FORM**

Name: \_\_\_\_\_ Fax: (     ) \_\_\_\_\_

E-Mail: \_\_\_\_\_

School: \_\_\_\_\_

Address: \_\_\_\_\_

City, State, Zip: \_\_\_\_\_

Phone: (     ) \_\_\_\_\_

Subject-matter working group choice:

Enclosed is a check for registration, including two continental breakfasts, two box lunches and one dinner.

\$125 (SALT members)

\$150 (non-members of SALT)

\$160 (registration plus SALT membership)

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tion, speak a language other than English in their homes. Most of these persons are, or will be, subject to adverse employer action merely as a result of the languages of their births and homes.

Secondly, none of the justifications commonly offered for such rules withstand close scrutiny under the business necessity standard required by the Equal Employment Opportunity Commission (EEOC) in the analysis of these rules. Employers often claim that such rules "reduce racial tension" in the workplace by silencing Spanish speakers (most of the cases involve Spanish speakers). It is an odd argument, indeed, that seeks to justify national origin discrimination because such discrimination "reduces racial tension." Consider the operation of Title VII at its inception in 1964.

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*"... one whose primary language is not English may legally be fired merely for speaking one's primary language in the workplace, even if there is no interference with job performance."*

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Surely many white employees throughout the country, particularly in the South, experienced heightened "racial tension" as a result of having to work alongside African-American employees because of Title VII. Yet to honor the argument that the reduction of "racial tension" felt by white employees justified denying or limiting the employment of African-American employees would have rendered Title VII entirely ineffectual. To honor this same argument with respect to Spanish speakers in the workplace is to give effect to discriminatory impulses against linguistically different Americans rather than to implement the tolerance and equality mandated by Title VII.

Thirdly, the "national origin" term in Title VII is in desperate need of authoritative construction by the Supreme Court. In the thirty years since Title VII was enacted, the Supreme Court has interpreted the "national origin" provision only once, and that opinion was rendered more than twenty years ago

(*Espinoza v. Farah Manuf. Co.*, 414 U.S. 86 (1973)). In the absence of guidance from the Court on the meaning of the term, with respect to the many issues that arise under it, the courts of appeal have regularly ignored the EEOC's Guidelines on National Origin Discrimination (29 C.F.R. § 1606). Indeed, contrary to

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*"... none of the justifications withstand close scrutiny under the business necessity standard..."*

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the EEOC guidelines, the federal courts of appeals that have considered the issue have now uniformly reached the conclusion that English-only rules do not violate or implicate Title VII. Consequently, one whose primary language is not English may legally be fired merely for speaking one's primary language in the workplace, even if there is no interference with job performance. This is a profoundly disturbing result.

As matters now stand, we have incoherent and virtually meaningless protection against discrimination because of ethnicity in the workplace. At the administrative level, plaintiffs may win cases based on the EEOC guidelines. However, as soon as these cases

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*"... it may be time to consider strategies for legislative reform of Title VII..."*

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are appealed to the federal district courts and courts of appeals, protection against language discrimination is now uniformly denied. This inconsistency presents a false promise of protection for ethnic characteristics, such as languages other than English, which is easily defeated by employers merely by appealing adverse judgments to the federal courts. This situation can only serve to mislead potential plaintiffs, who may be

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encouraged by the EEOC guidelines, and to disparage and undermine these guidelines.

We were successful in helping persuade the Justice Department to file a brief urging the Court to grant certiorari in the *Spun Steak* case and to overturn the decision in the Ninth Circuit. However, despite the Justice Department's brief, the Court decided to deny certiorari. Given the Court's consistent denial of certiorari on issues of so-called national origin discrimination (one decision in thirty years, despite many opportunities), it may be time to consider strategies for legislative reform of Title VII to cover the kinds of discrimination that courts are allowing to occur. ■



continued from page 1 - President's Column

gay or lesbian litigant's right to liberty or privacy. I have chosen to start with this issue because all of the constitutional law casebooks include *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding Georgia's sodomy statute against a substantive due process challenge while applying rational basis review) as a leading case. A discussion of *Hardwick* can also be viewed as a prerequisite for a consideration of other constitutional issues because the Supreme Court's decision has had a rather adverse impact on the subsequent development of both equality and first amendment rights for gays, lesbians and bisexuals.

Yet, despite *Hardwick*'s importance as an essential building block, it also is an uncomfortable starting point. If one is a gay, lesbian or bisexual law professor, one may imagine that one's students are asking themselves: Does my professor engage in criminal conduct? If one is a gay, lesbian or bisexual student, one may "imagine that [one's] experience in sitting through a class discussion of *Hardwick* [is] similar to that of a hypothetical Negro student sitting through a discussion of *Dred Scott* . . . ." [Brest and Levinson casebook at p. 1027.] If one is a heterosexual law professor or student, one may wonder how many gays, lesbians or bisexuals are in the classroom and select one's words with special care so as not to offend anyone. And no matter who one is, one will fervently hope to make it through the hour without blushing or

stammering as one utters such phrases as "anal sex," "oral sex" and "manual sex."

Although it is difficult to discuss sex in a law school classroom (e.g., my students cracked up when I unwittingly asked whether heterosexuals and homosexuals are "similarly situated" under Georgia's sodomy statute), the effort will pay off in a discussion of *Bowers v. Hardwick*. Justice White's majority opinion defines a "fundamental liberty" as one that is "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." The Court then holds that "neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy" because "proscriptions against that conduct have ancient roots." In particular, the Court notes that sodomy was a criminal offense at common law, was forbidden by the laws of the original thirteen states when they ratified the Bill of Rights, and was prohibited by 32 of the 37 states when the Fourteenth Amendment was ratified. Against this background, says Justice White, "to claim that a right to engage in such conduct is 'deeply rooted in this nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious."

A careful reading of Justice White's opinion will leave the reader in a state of uncertainty as to the court's ruling. Does Justice White say that all "consensual sodomy" has been prohibited historically? If so, would he extend the holding in *Hardwick* to a hetero-

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sexual charged with a violation of Georgia's sodomy statute? See *Moseley v. Esposito*, No. 89-6897-1 (Ga. Super. Ct. Sept. 6, 1989). Could he distinguish *Griswold* and *Eisenstadt* (cases striking down state regulation of nonprocreational sexual acts)? Is it significant that the Supreme Court denied certiorari in *Oklahoma v. Post*, 715 P.2d 1105 (Okla. Crim. App.), cert. denied 479 U.S. 890 (1986) (holding facially neutral sodomy statute unconstitutional as applied to hetero-



sexual conduct); accord *State v. Pilcher*, 242 N.W.2d 348 (Iowa 1976); see generally Janet E. Halley, Reasoning About Sodomy: Act and Identity in and after *Bowers v. Hardwick*, 79 Va. L. Rev. 1721, 1777-80 (1993) (cross-sex sodomy cases collected).

Or does Justice White say that it is "homosexual sodomy" that has been prohibited? If so, is his statement factually correct, particularly with reference to Georgia's sodomy statute? Students find it interesting to learn that the original language of Georgia's sodomy statute prohibited "the carnal knowledge and connection against the order of nature, by man with man, or in the same unnatural manner with woman." Ga. Crim. Code §26-5901 (1933). They puzzle over the question of whether Michael Hardwick's act of mutual oral sex with another man violated Georgia's original sodomy statute. They learn (from those casebooks that include the first footnote to the dissenting opinion) that the Georgia Supreme Court ruled in the 1900s that the original sodomy statute covered neither lesbian nor heterosexual cunnilingus. They begin to realize that "nonprocreation was the central offense of the crime," which is why "most early American statutes defined sodomy in terms of anal intercourse, whether between men or between a man and a woman." Nan D. Hunter, *Life After Hardwick*, 27 Harv. Civ. Rts.-Civ. Lib. L. Rev. 531, 533 (1992). See also Anne B. Goldstein, History, Homosexuality and Political Values: Searching for the Hidden Determinants of *Bowers v. Hardwick*, 97 Yale L.J. 1073, 1081-87 (1988).

Students then turn to the language of Georgia's current sodomy statute, as amended in 1968, prohibiting "any sexual act involving the sex organs of one person and the mouth or anus of another." They realize that the amended statute encompasses a wider range of same-sex sexual activity than the original statute, but it is not a prohibition on "homosexual sodomy" (i.e., heterosexual sodomy is also proscribed), nor is it a prohibition on all sexual activity between people of the same sex (e.g., manual sex is not proscribed).

Although Georgia does not have a long history of proscribing "homosexual sodomy," there are eight states that have amended their sodomy laws since 1973 to proscribe only oral or anal sex between persons of the same sex (Montana and Texas in 1973; Kentucky in 1974; Arkansas, Missouri and Nevada in 1977; Kansas in 1983; and Tennessee in 1989). These statutes evidence the modern trend to equate homosexuality with sodomy. Ironically, then, Justice White

invokes history to justify the majority's holding that there is "no fundamental right" to engage in homosexual sodomy, but history is not as firmly on his side as are contemporary social norms, which have "converted sodomy into a code word for homosexuality." Nan D. Hunter, *supra* at p. 542; see also Janet E. Halley, *supra*, at p. 1722.

In addition to developing the tension between "sodomy legislation as a regulation of sexual acts" and "sodomy legislation as a regulation of sexual identities," a discussion of *Bowers v. Hardwick* can be enriched by questioning whether the Supreme Court might one day overturn the case. Students are often surprised to learn that Justice Powell, during a speech to law students at New York University in 1990, said that he "probably made a mistake" in *Bowers v. Hardwick*, that the case was a "close call," and that his vote was "based on the fact that the statute had not been enforced [against private homosexual activity] for several decades." John Jeffries, Jr., *Justice Lewis E. Powell, Jr.*, pages 511-30 (1994). Students are also intrigued to learn that state court judges, interpreting state constitutions, have stricken homosexual sodomy statutes in a few post-*Hardwick* cases. The most authoritative of these cases is *Commonwealth of Kentucky v. Wasson*, 842 S.W.2d 487 (Ky. 1992), a 4-3 decision, which is included in the new constitutional law casebook by Farber, Eskridge and Frickey as a note case to *Hardwick*.

In *Wasson*, the defendant was charged with soliciting an undercover policeman to engage in "deviate sexual intercourse with another of the same

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sex" in the defendant's home. "Deviate sexual intercourse" was defined by the legislature as "any act of sexual gratification involving the sex organs of one person and the mouth or anus of another." *Wasson* moved to dismiss the charge on the grounds that the

*continued on page 14*



statute 1) violated his rights to liberty and privacy and 2) denied him equal protection because it proscribed only same-sex sodomy. The Kentucky Supreme Court upheld the motion to dismiss on both grounds. With respect to the liberty claim, the Court observed that "a significant part of the Commonwealth's argument rests on the proposition that homosexual sodomy was punished as an offense at common law, and that it has been punished by statute in Kentucky since 1860," cit-

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ing to *Bowers v. Hardwick*. The Court rejected the Commonwealth's proposition, however, because "sodomy as defined at common law and in the 1860 statute is an offense . . . limited to anal intercourse between men." Unlike the current same-sex sodomy statute, Kentucky's common law tradition punished neither oral copulation nor any form of deviate sexual activity between women." The Kentucky Court then turned to precedents from the Prohibition Era (when Kentucky judges, thinking that drinking was immoral, nevertheless recognized that private possession and consumption of liquor was a liberty interest beyond the reach of the state). The Court reiterated its earlier rulings that "it is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society."

The Kentucky Court refused to follow the reasoning in *Bowers v. Hardwick* because it viewed that case "as a misdirected application of the theory of original intent." It noted that "as a theory of majoritarian morality, miscegenation was an offense with ancient roots." Nonetheless, in *Loving v. Virginia*, 388 U.S. 1 (1967), the United States Supreme Court recognized "that a contemporary, enlightened interpretation of the liberty interest involved in the sexual act made its punishment constitutionally impermissible." By analogy, the Kentucky Court found that a contemporary, enlightened interpretation of the liberty inter-

est involved in the sexual acts proscribed by the state's sodomy statute made their punishment constitutionally impermissible, particularly in light of the fact that approximately half of the states have repealed sodomy laws since 1961.

Teaching *Bowers v. Hardwick*, together with other sodomy cases, required me to focus on the specific sexual acts in each case. I required my students to be explicit as well. At the very beginning of our consideration of *Hardwick*, I discovered that many students believed that all same-sex sexual conduct constituted sodomy and many did not believe that heterosexuals could engage in sodomy. Such viewpoints are consistent with the popular understanding that *Hardwick* was about criminalizing homosexuals, not sex. No, it is not easy to talk about sex in the law school classroom. Yet, despite some moments of discomfort (and humor), I am convinced that the effort (and the discomfort) are worth it in order to show students the underlying tensions in the *Hardwick* decision. ■



## SALT's RECRUITMENT EFFORTS PAY OFF

— Cynthia Grant Bowman  
Northwestern University  
School of Law

SALT is growing! We now have more than 800 members at 153 law schools. It's unclear whether this is the result of more intensive recruitment efforts on the part of the Board or whether there has finally been a turn in the tide toward more progressive politics on law faculties, but SALT's membership has more than doubled in the last six years.

Date	Membership
4/74	150 founding members
9/87	373
9/88	411
5/89	426
5/90	535
12/91	630
12/92	640
12/93	790
5/94	827



The dramatic increase in numbers in 1993-94 may be explained by several recruitment efforts undertaken by the Board over this period. At the May 1993 Board of Governors meeting, we decided to appeal to adjunct as well as full-time faculty members; and in December a letter telling them about SALT and inviting them to join was distributed by a SALT member at each school. At about the same time, we asked SALT members on the faculty at each school to recruit other faculty more generally, as we do each year, and we also sent out an appeal to law librarians. Some of these efforts were already starting to pay off by the time of the January Board meeting in Orlando. The high attendance and enthusiasm of the participants at the two very successful teaching conferences during 1993 (NYU in May and Santa Clara in October) may also explain some of the increase in membership by May of 1994.

In early June of this year, we designed a new

recruitment brochure that emphasizes all of our recent activities – including the amicus briefs filed, public advocacy, teaching conferences and Cover retreats – and used this brochure to recruit at both the AALS Clinical Conference and the New Teachers Conference over the summer. If any of you would like a copy of this brochure for use in soliciting your friends and colleagues to join SALT, please contact me at Northwestern University School of Law, 357 E. Chicago Avenue, Chicago, IL 60611, or send me a message via E-mail. My address is CGBLCF@nuls.law.nwu.edu. In addition, the Board is very interested in your ideas and suggestions for further recruiting, so send those along to me as well. We are also printing extra copies of this *Equalizer* for use in attracting new members.

If you are not a current dues-paying member but would like to join SALT, simply fill out the membership form below. ■

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