

EQUALIZER **SALT**

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SALT BOARD ACTS ON VARIETY OF ISSUES

The SALT Board meets three times a year in order to plan new projects, report on existing activities and set the group's agenda for the next few months. At the last SALT Board meeting, held May 19 at the University of San Francisco, the fifteen Board members who attended considered a wide variety of issues and proposals.

THE COMPOSITION OF ABA SITE EVALUATION TEAMS

The Board spent considerable time discussing the implementation of the AALS non-discrimination policy. (Specifics of this policy are addressed in an article by Pat Cain, Martha Chamallas and Jean Love on page 5 herein.) The Board's discussion of the enforcement of the AALS non-discrimination policy led to a general discussion of accreditation issues and re-accreditation inspections. Several Board members questioned whether the AALS will enforce their policies in light of their apparent reluctance to address them during site inspections. An illustration of this failure was raised by the recent site inspection of Boalt Hall, which has been the focus of several allegations of discrimination against women in the tenure process. Boalt's site inspection team was composed of six white males who concluded that gender discrimination did not exist. The Board decided to urge both the ABA and AALS to appoint inspection teams with diverse memberships and to address issues of discrimination and bias during the inspection process. Our president, Howard Glickstein, was authorized to contact Jim White, who is the law school consultant to the ABA Section on Legal Education and whose office organized the site inspections, to inform him of the need for more diversity on ABA inspection teams and to note that the ABA non-discrimination and affirmative actions policies are now less inclusive than those of the AALS.

[Ed. In his reply, Dean White has written the following:

"The matter of diversity in membership of site evaluation teams is a matter of concern to me, to the Accreditation Committee and to members of the Council. It is a matter that I hope we will continue to address in a positive way.

"I appreciate your suggestion of the members of the SALT Board serving as possible members of the site evaluation teams. Certainly, we will consider calling upon members of your Board from time to time. Looking at members of your Board, I do know that we have in the past asked Barbara Babcock, Drew Days, Dean Rivkin and Elizabeth Schneider to serve as members of a site evaluation team. This past year, Elizabeth Schneider, Dean Rivkin and Joyce Saltalamachia all were members of site evaluation teams.

"With regard to the divergence between ABA and AALS NonDiscrimination/Affirmative Action Policies, it is my understanding that the Affirmative Action Committee will bring this report to the attention of the Council. I look forward to discussing this matter further with you."

Howard Glickstein is a member of the ABA Affirmative Action Committee, so we can be certain that the question of the ABA Affirmative Action Standards regarding sexual orientation will be pursued.]

FACULTY DIVERSITY

The Board discussed the controversy at Harvard Law School over faculty diversity. To protest the absence of any minority women faculty members, Derrick Bell has taken a one-year, unpaid leave of absence. It was suggested that SALT draft another statement on the need for faculty diversity, including proposed standards for faculty hiring. The Board agreed that SALT should make a public statement as quickly as possible. [Ed. The statement has

now been drafted, principally by Paulette Caldwell, reviewed by Derrick Bell, Richard Chused and Howard Glickstein, and distributed to SALT Board members for their approval. The statement, soon to be publicly released, concludes with these words:

"Neither colleges and universities in general nor law schools in particular can be expected to cure all of the ills of society. They should not be allowed, however, to claim positions of privilege in the effort to desegregate schools by hiding behind claims of diminished standards of quality or the protection of academic freedom. Quality legal education cannot be provided unless those teaching represent a diversity of experience, knowledge and insight. If the society is not entitled to look to the citadels of reason and enlightenment for leadership in the ongoing battle for meaningful equality and integration, it surely can demand that they cease dragging their feet and live up to the expectations imposed by the letter and spirit of the law on all other institutions."]

ABORTION

Howard Glickstein reminded the Board that the American Bar Association House of Delegates had endorsed a pro-choice resolution at its mid-year meeting in January and that there was a movement by some ABA members to press for a repudiation of this resolution at the general ABA meeting in August. Howard reminded the Board that many schools had taken out ABA memberships for all faculty members and that, then, they would be entitled to vote at the August meeting. Board members were urged to inform their faculty colleagues of the

importance of this vote and to encourage their attendance at the general assembly session on Monday, August 6. [Ed. The entire SALT membership received such a reminder by letter in mid-June. As most readers are undoubtedly aware, the general assembly narrowly voted (887-837) to recommend that the House of Delegates adopt a "neutrality" position with respect to the abortion issue. Few SALT members were in attendance. The House of Delegates followed, with a bare majority vote, by adopting the assembly recommendation, thereby dramatically reversing its earlier pro-choice stance which had been passed by a 2-1 margin last January. SALT members are urged not to resign from the ABA, but, rather, to engage themselves (and have their votes counted) in the next round of battle].

FETAL HAZARDS

Board member Mary Becker asked that SALT sign an amicus brief advocating the reversal of the Seventh Circuit's decision in International Union v. Johnson Controls, Inc. Johnson Controls deals with fetal hazards in the work place, and the Seventh Circuit has held that an employer could exclude all fertile women from a work place without violating Title VII's ban on discrimination on the basis of sex. While sympathetic to the issues in the case, some Board members felt that it was inappropriate to involve SALT in the matter because it did not focus on issues of legal education. Also, there were differences of opinion among Board members about certain specific issues that were likely to be raised in the brief. However, the Board decided that, because this case relates to an issue of diversity, SALT would sign as an organization, provided that a committee of the Board approves the language of the brief. [Ed. The brief has been "SALT-approved". Excerpts from the brief are re-printed on page 9 herein.]

AAUP and GENDER-SPECIFIC LANGUAGE

Howard Glickstein reported that he had been contacted by the American Association of University Professors who asked that SALT sign their 1940 statement regarding academic freedom and tenure. Upon discussion of the statement, Board members felt that it was impossible to review its substance because the language was heavily gendered and used only male pronouns. The Board authorized Howard to explain the SALT position to the AAUP and recommended that he send copies of his letter to the



dozens of organizations who have signed the statement since it was introduced in 1940. [Ed. Upon notification of SALT's position, the AAUP revised its statement in gender-neutral terms. As a result, the SALT Board will review the substance of the statement at its September meeting.]

SOCORRO SOCIETY

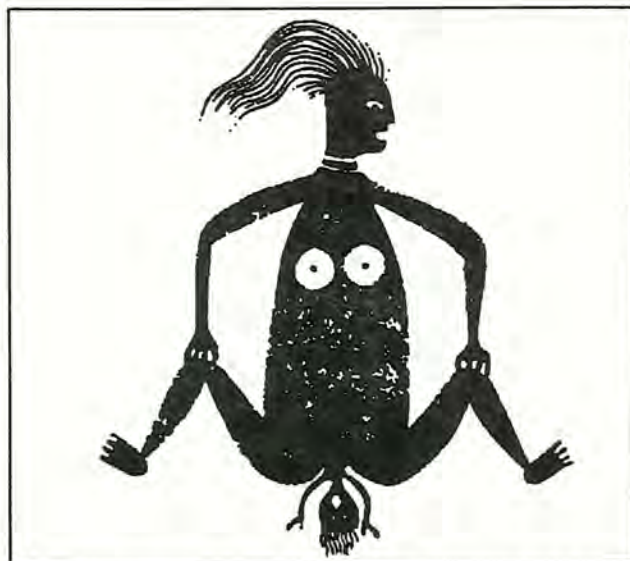
Eleanor Eisenberg, the Executive Director of the Socorro Society, asked for SALT's support in Socorro's efforts to match lawyers or law students who want to do pro bono work with programs that need such assistance. The Socorro Society was featured in the SALT Equalizer issue of April 1990. It seeks to establish in law schools student chapters devoted to working on public interest projects. The Board decided to meet with Cruz Reynoso, who is the Chair of the Socorro Society Long Range Planning Committee, to talk more about SALT's involvement.

PLANS FOR WASHINGTON

The Board also discussed possible ideas for the SALT panel at the next AALS annual meeting. Patricia Williams, as Chair of the Jurisprudence Section of the AALS, agreed to explore the possibility of co-sponsoring a panel with SALT. She and Pat Cain, the Chair of the SALT Planning Committee, will work together on this project. There will be more information on this panel and other SALT activities at the AALS annual meeting in the next issue of this newsletter.

COVER CONFERENCE

Judith Resnick reported on both the Cover Public Interest Retreat and the Cover Study Group. She announced that Charles Lawrence will lead the study group at the 1991 AALS annual meeting, the date and time of which is to be announced in the future. She also announced that the same campground had been reserved for the retreat but that they were open to the idea of holding it in another place, possibly on the West Coast. Judith reported that a criticism of this year's retreat was that the people in attendance were predominantly from the East and predominantly white. The Board talked about the possibility of scheduling the conference at a different time or scheduling the conference during the spring break of the West Coast schools. Board members also decided to make a special effort to reach out to interested minority students by contacting them through minority law students associations.



[Ed. Members: Especially if your school has never been represented at the Cover Conference, please act now to encourage your student organizations to sponsor a student or, with a few of your colleagues, sponsor a student yourselves. Here's a good opportunity to help point our students in the right direction.]

Treasurer Stuart Fuller reported that SALT is solvent, with \$48,373.19 in our treasury and that our membership now numbers 535. Seventy new members were added through the Webster mailing, and forty new members joined after the last AALS annual meeting. Further membership mailings will be sent to law school deans and to SALT's "affinity groups". [Ed. Members: Why not circulate a memo to your faculty colleagues with a copy of the newsletter and encourage them to join SALT?]

The next Board meeting will be held Saturday, September 15 after completion of the SALT Public Interest Law Conference at NYU. At this meeting the Board will consider nominations for Board vacancies, nominees for the SALT Award and any number of new issues and projects that may present themselves. A longer meeting, in the form of a retreat, is being contemplated for May, 1991.

Joyce Saltalamachia

President's Column

This Spring, the Law School Admission Council announced that it was revising the LSAT exam and also the method of scoring. All of the reasons for this action are too complex to go into here. In a nutshell, the content of the exam is being revised to re-

duce the possibilities for preparation and to improve the quality - in terms of predictability - of the questions being used. The scoring, which will be changed from a 10-48 scale to a 120-180 scale, is being altered because of the revision of the content of the exam and because the current scale does not make fine enough distinctions, particularly at the upper end. Apparently, there have been too many high scores and some law schools find it difficult to distinguish among the 45s, 46s and 47s.

At the Law School Admission Council Annual Meeting in Naples, Florida (it is much easier to push through controversial changes in a pleasant setting) I publicly objected to these changes. In part, my objection stemmed from my position as a dean. I criticized the Law School Admission Council for adopting such far reaching changes without presenting its proposals to the law schools and soliciting comments. This, as you know, is the procedure followed every time the ABA changes an accreditation standard. Not only were law schools not consulted about these changes but the major organizations that speak for legal education - the Council of the ABA Section of Legal Education and the Executive Committee of the AALS - were not consulted.

Besides my objection to the procedure followed by the Law School Admission Council in deciding upon these changes, I fear that the changed LSAT scoring will place an even greater emphasis on the LSAT score as a basis for admission. We abandoned the 200-800 scale because we felt that some schools were making distinctions where none existed. Was

there really a difference between a 650 and a 655? The 10-48 scale was intended to bunch people into larger categories so that there would be less of a tendency to rely exclusively on numbers in the admissions process. It is just as well that close distinctions cannot be made between different scores. This forces attention to factors other than the LSAT. Now, with the 120-180 scale, the LSAT is likely to play an even greater role in the admissions process.

What we do in admissions has a fundamental impact on everything else that occurs in law schools and on the nature of the bar. It might well be that testing instruments could be developed to identify many of the characteristics that we as SALT members value in law students. There might be ways of determining an individual's ethical sensitivities, an individual's likelihood of becoming involved in public interest work, or an individual's competence with skills other than analytical and logical reasoning. Law schools, however, have ceded a major role in the admissions process to an outside organization, although, to be sure, an organization allegedly controlled by the law schools. Maybe it is time that we begin looking more closely at the admissions policies of our schools and see to what extent the LSAT and the undergraduate GPA are the dominant influences.

Law faculties have a major role to play in establishing admissions policies. This is an area in which it would be useful for SALT members to become more active. Service on an admissions committee is demanding. But we might be less frustrated over law student indifference if we made more of an effort to insure, through the admissions process, that those people we admitted excelled in other areas besides test taking. The cavalier way in which the Law School Admission Council has gone about revising the LSAT might have the positive effect of alerting law schools to the extent to which they have abdicated their responsibilities for establishing standards for admission.

Whatever admissions officers say, in the vast majority of American law schools the LSAT is the principal factor in deciding on who attends. We have allowed the key to the law school door to be molded by psychometricians. This is too important a responsibility for law teachers to relinquish.

At the ABA meeting in August, the law school



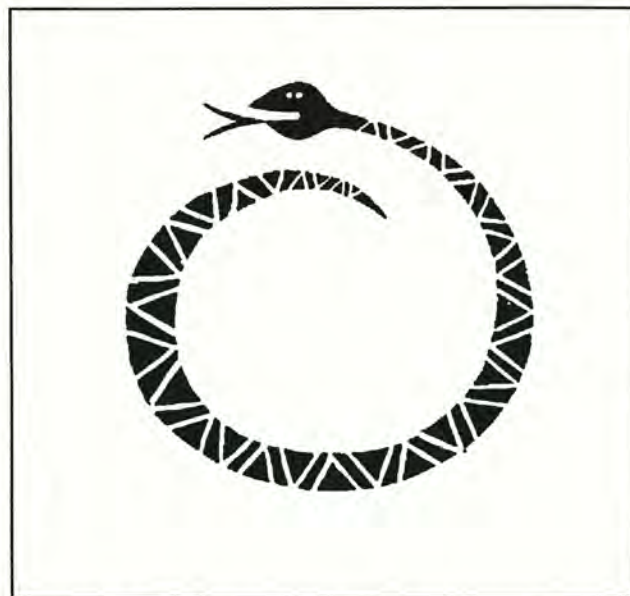
deans who were present voted 26-21 to ask the LSAC Board of Trustees to reconsider the new scoring scale. Subsequently, the Board of Trustees called a special meeting for September 8, 1990, to discuss this issue. I plan to attend.

Howard Glickstein

AALS Nondiscrimination Policy: Are Schools Complying?

During an historic meeting of the House of Representatives of the Association of American Law Schools (AALS), the delegates voted, in January of 1990, to amend the Association's nondiscrimination policy. The AALS Bylaws now provide that a member school "shall provide equality of opportunity" in admissions and employment "without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, handicap or disability, or sexual orientation". Furthermore, the Bylaws now state that a member school "shall pursue a policy or providing its students and graduates with equal opportunity to obtain employment" without discrimination on any of the above grounds. In addition, a member school "shall communicate to each employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principle of equal opportunity." [Ed. At its August meeting, the Executive Committee adopted Executive Committee Regulation 6.19 to explain the term "communicate". See below for details.] Lastly, the amended Bylaws now require that a member school pursue the "affirmative action objective" of having a "faculty, staff and student body which are diverse with respect to race, color and sex."

SALT strongly supported the adoption of the 1990 amendments and it will now actively encourage the implementation of the Bylaws. At its meeting in May, the SALT Board decided that implementation might be facilitated if AALS member schools could share information about specific successes or difficulties at their own institutions. To that end, SALT is willing to act as an informal clearing house. SALT Board members Jean Love, Pat Cain and Martha Chamallas were appointed to serve on an ad hoc committee overseeing this project. This article



serves as a preliminary report of that committee, focusing on stories from several different schools, as well as reporting interim data from the most recent survey by the AALS Section on Gay and Lesbian Legal Issues. All of the stories in this report center on issues raised by the addition of "sexual orientation" to the nondiscrimination policy. We have had no reports of problems created by any of the other changes in the policy. If any of you have additional stories that you think would be of interest to others working toward full implementation, please let us know by contacting Martha Chamallas, University of Iowa College of Law.

Survey on Compliance

The AALS Section on Gay and Lesbian Legal Issues has collected data which suggests that an increasing number of schools are adding sexual orientation to their nondiscrimination policies as required by the new Bylaws. In a 1987 survey of AALS member schools, the Section found that 44 schools (out of 170) prohibited discrimination on the basis of sexual orientation in admissions and employment, while 34 schools prohibited such discrimination in placement.

In a 1990 survey that is now underway, the Section has found that 19 additional schools have recently adopted nondiscrimination policies as to admissions and employment, and 17 additional schools have adopted such policies as to placement. The total figures to date show that 63 schools prohibit discrimination on the basis of sexual orientation in admissions and employment, while 51 prohibit such discrimination in placement. Of these 51, 24 have

placement policies that exclude all employers who discriminate on the basis of sexual orientation, including the military. The SALT newsletter will include the final results of this survey whenever they are available.

Reports from Individual Schools

This report focuses on schools that have responded to the AALS Bylaw amendment since January by attempting to extend full protection against discrimination to gay men and lesbians.

St. Louis University. The only AALS member schools that are exempt in any way from the Bylaws are religious law schools. An Executive Committee Regulation (E.C.R. 6.17) exempts religious schools from the "sexual orientation" nondiscrimination provision in order to permit such schools "to adopt preferential admissions and employment policies that directly relate to the school's religious affiliation or purpose." Any law school adopting such a policy must provide notice "to members of the law school community (students, faculty and staff) before their affiliation with the school."

Of course, religious law schools may choose to comply fully with the Bylaws. As reported by Gene Schultz, the law school faculty at St. Louis University has voted to request that its central administration allow it to pursue full compliance with the AALS Bylaws. That request is currently pending.

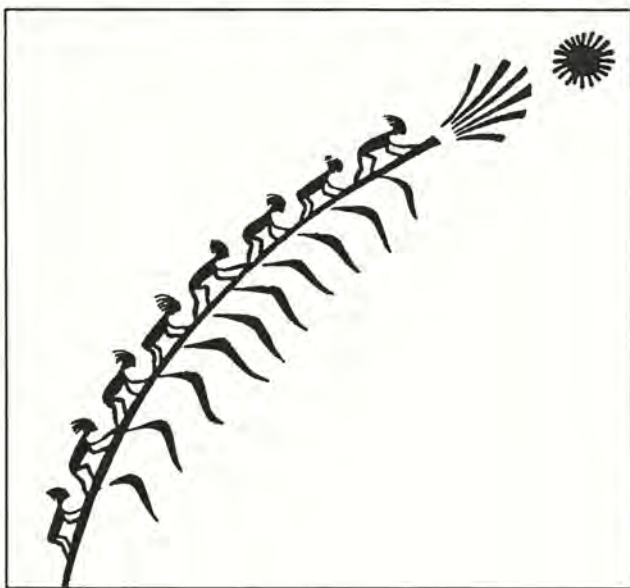
California Western. Marilyn Ireland reports that California Western responded promptly to the AALS amendment by strengthening its anti-discrimination policies. Almost ten years ago, stu-

dents at Cal Western had been successful in getting the school to ban employers who refused to consider all qualified students due to stereotypes based on race, sex or sexual orientation. But, at that time, it exempted the military from the policy. Cal Western is a small, free-standing law school in San Diego, a city heavily dominated by the Navy. At the first faculty meeting after the January AALS convention, the Cal Western faculty voted to rescind the exemption and to cancel military recruitment and hiring on campus. To comply fully with the spirit and letter of the AALS policy, Cal Western was prepared to bear the consequences of an unpopular action in the eyes of some alumni and people in the community. Ireland stressed that it is now vitally important to assure that all schools comply, so that schools doing the right thing do not suffer disproportionately in fundraising and other external activities.

University of Iowa. The AALS policy was important in determining the fate of Iowa's anti-discrimination policy. The College of Law has taken a "do-it-yourself" approach to placement equity and is the only college at the University of Iowa to bar recruiters who discriminate against gay and lesbian applicants.

Six months before the AALS policy was adopted, the Iowa law faculty voted to amend its placement policies to bar any employer who discriminated against gay and lesbian students. Under the Iowa approach, employers who wanted to use law school facilities to recruit were required to sign a special assent form indicating that they did not make recruitment decisions on the basis of race, gender, creed, national origin, age, disability or affectional preference. Any employer who relied on one or more of the forbidden categories was required to demonstrate that its reliance was both "lawful and related to the legitimate requirements of prospective employment."

As expected, the Army JAG Corps returned only a qualified assent form to the Iowa placement office. The Army tried to justify its discrimination against homosexuals as "predicated upon practical military requirements." Noting that "[s]oldiers must often sleep and perform personal hygiene under conditions affording minimal privacy," the Army asserted that "the presence of homosexuals in such an environment tends to impair unit morale and cohesion



as well as infringe upon the privacy of other soldiers." The next step in the process was for the faculty-student Placement Committee to vote on the adequacy of the Army's justification. The Placement Committee voted to exclude the Army from recruiting at the Iowa College of Law because it was unpersuaded that the Army's privacy argument showed that the exclusion was job-related. Subsequently, a similar process was followed with respect to the Marine JAG Corps and the FBI before they were also excluded from on-campus recruiting at the Law College.

At this point, the central administration of the University stepped in, initially taking the position that the Law College had no authority to ban employers who discriminated on grounds that were not unlawful under state or federal law. It took this position despite the fact that several years earlier the University of Iowa had included a ban on gay and lesbian discrimination in its Human Rights Policy. The central administration nevertheless contended that the Human Rights Policy did not govern placement and took a hard line view that individual colleges were not free to be more progressive than the University as a whole. (Note: A similar position has been taken by President Gardiner of the University of California.)

Under the banner of collegiate autonomy, the Law College persisted in enforcing its policy and negotiated with the central administration to allow the Law College to exclude discriminatory employers from the law building, even if law students decided to interview across campus in the ROTC building. The central administration reluctantly honored the Law College's decision and encouraged the Army to interview at the ROTC building.

In the meantime, the AALS adopted its policy change which considerably strengthened the Law College's position with the central administration. The details of the Law College's ban were renegotiated so that the College would take a relatively passive role when law students wished to interview with banned employers elsewhere on campus. The Law College agreed to post a sign-up sheet for off-site interviews, along with a statement of the reasons why the employer was banned from recruiting at the Law College. Aside from forwarding the interviewer's sign-up sheet, Law College staff would not han-



dle any other administrative details associated with off-site recruiting.

University of Michigan. The University of Michigan has a university-wide internal policy banning sexual orientation discrimination which has been in effect since 1985. However, this policy does not cover outside employers who wish to use university facilities in recruiting for employment. During the 1988-89 academic year, the law school faculty adopted a policy for law school placement office users which specifically barred all employers who discriminated against gays and lesbians. The new policy was intended to apply to both private and public employers. The President's office initially took the position that the law school did not have the authority to enforce such a policy and that such a policy would have to be adopted by the Regents to be effective. The general consensus is that the Regents would not support such a policy, and it is unknown whether the AALS rules would have any weight with the Regents.

The law school community continued to stand behind its decision. Last fall, the central administration decided to let the policy stand as to private employers, but insisted that the law school not enforce the policy against public employers, such as the military. On February 8, 1990, the Army came to the law school to interview. Shortly thereafter, the Lesbian and Gay Law Student Alliance met with the University's President and Provost to push for reinstatement of the policy against the military, the CIA and the FBI. The student group has asked to meet with

the Board of Regents to discuss the matter as well.

The current brochure that is sent to recruiters by the placement office states the antidiscrimination policy in full, including the ban against discrimination on the basis of sexual orientation. At the end of the statement, in fine print, is the following: "The portion of the Law School policy applicable to sexual orientation will not be applied to public agencies."

University of Texas. At long last, the administration of the University of Texas has responded favorably to student pressure to adopt a nondiscrimination policy that will protect lesbian and gay members of the university community. Law students have been working towards this goal for at least three years. The University of Texas at Austin has never before taken any action, campus-wide or at the law school level, regarding discrimination against lesbians and gays. This fact is somewhat anomalous because the University is located in the City of Austin, which has included lesbians and gays in its nondiscrimination laws since the early 1970's. In addition, Austin, as the capital, is the home of state agencies, at least two of which have adopted nondiscrimination policies protecting lesbians and gays.

The pressure to include lesbians and gays in the university nondiscrimination policy originated with law students who were seeking to add sexual orientation to the nondiscrimination policy of the law school placement office. The Dean of the law school, in response to student pressure, approached the president of the University, who responded that the

law school could not adopt a policy applicable to outside employers that was different from the campus-wide policy. While law students debated how to initiate legislation that might change the campus-wide policy, the AALS Bylaws were amended. With the new Bylaws in hand, the Dean of the law school approached the president a second time with a request to allow the law school to add sexual orientation to its placement nondiscrimination policy.

The matter was referred to various administrative officers, which meant that it lay buried for months. When it was finally referred to the UT System General Counsel's Office for a legal opinion, the student newspaper picked up the story. The student response has been strong, vocal and visible. A petition signed by 37 student organizations was presented to the president calling for an "end to discrimination against lesbians and gays at the University of Texas at Austin." Incidents of lesbian and gay discrimination and harassment were reported daily in the student newspaper. Student groups prepared a "brief" addressed to the General Counsel, pushing for adoption of the policy campus-wide and not just at the law school.

The new policy was issued by the UT System chancellor on August 10. The policy appears to be an internal one that prohibits sexual orientation discrimination by the University regarding "admissions, employment, or access to programs, facilities or services." With respect to outside employers who use university facilities, the new policy states that they "should also be encouraged to adhere to principles of fair treatment and equal opportunity except as otherwise authorized by laws or governmental regulations." How this policy will be implemented by the law school placement office remains to be seen.

AALS Update: Executive Committee Regulation 6.19, adopted in August, provides, in part:

A member school...shall require employers, as a condition of obtaining any form of placement assistance or use of the school's facilities, to provide an assurance of the employer's willingness to observe the principles of equal opportunity stated in Bylaws 6-4(b).

The regulation further provides that law schools must "investigate any complaints concerning dis-



criminatory practices against its students..." The regulation certainly seems to contemplate that law schools prohibit employers such as the Army from using its placement facilities since the Army explicitly discriminates on the basis of sexual orientation and thus will not state its willingness to comply with the Bylaw. Schools that currently allow the Army to use its placement office facilities would appear to be in violation of the Bylaw.

The Executive Committee Regulation will continue in effect unless objections are received from 25% of the member schools within 60 days of the date on which the regulation was mailed to Deans (August 10, 1990). SALT members are encouraged to support the Regulation.

*Pat Cain
Martha Chamallas
Jean Love*

SALT Joins Amicus Brief in Fetal Hazards Case

[Ed. Reprinted below are excerpts from the amicus brief filed on behalf of SALT, inter alia, in the Johnson Controls case. Counsel of Record is SALT member Nadine Taub. The brief was approved, on behalf of the SALT Board, by Kim Crenshaw, Stephanie Wildman and Richard Chused.]

SUMMARY OF ARGUMENT

This case revisits familiar terrain. Once again, women's biological role as childbearer is advanced as a rationale for discrimination that would deny women lucrative employment or, in a modern twist, require them to be sterilized to qualify for full employment rights. Johnson Controls' policy, sweeping in scope and virtually unlimited in its implications, treats all women as "childbearing vessels" and assumes that children will be better off if women do not work - at least not in their battery plants. (The policy excludes all women who cannot prove they are incapable of bearing children from all jobs in which any employee has recorded a blood lead level of 30 ug/dl during the preceding year, or in which the job site yielded an air lead sample in excess of 30 ug/m³ during the preceding year, or in which the line of progression would lead to such a job.) Women workers, however, are not always pregnant, the risks of employment are not confined to them, and employment brings them and their families concrete



benefits. This case thus raises critical and timeless questions about who should assess, manage and balance the risks of everyday life, and whether that process should be different for women and men.

In the past, exclusion of women from hazardous employment was justified to protect the "future well-being of the race"... In an era in which workplace protection for both sexes was foreclosed, the attainment of "half a loaf" of workplace protection may have seemed appropriate. This "protection" was to prove doubly inadequate, however, as women lost economically and men remained subjected to harsh working conditions.

The Fair Labor Standards Act...reflected legislative recognition that all workers required protection from onerous working conditions. Similarly, the Occupational Safety and Health Act...recognized the vulnerability of both sexes to workrelated health risks and the need to establish exposure limits and workplace standards that would insure, "to the extent feasible", that "every working man and woman" would enjoy a "safe and healthful" workplace...

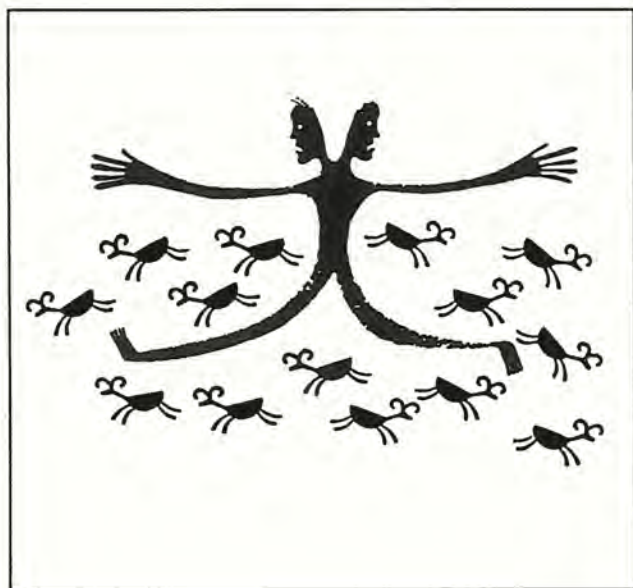
Notwithstanding this evolutionary process, Johnson Controls' position differs little from that taken by the advocates and defenders of protective labor legislation. Johnson asserts that women must be involuntarily excluded from such jobs essentially to protect "the future well-being of the race." This position has been rejected on the merits by federal health authorities...Moreover, in Title VII of the Civil Rights Act of 1964...Congress determined that, even if women do require a greater level of workplace

health protection, they are still entitled to equal opportunity in employment.

The legal issues presented by this case are relatively straightforward. Title VII prohibits this historically-familiar effort to limit the rights and daily activities of women in the name of future generations, and it was plainly the intent of Congress to prevent women from being subjected to continued economic disadvantage because they are or might be pregnant...

The failure of the court below to enforce Title VII enmeshed it in a dispute over the scientific validity of a discriminatory policy. Title VII litigation was never intended to be the forum for such disputes: Congress has decided that discrimination is contrary to public policy and that workplace safety standards are appropriately established by federal regulatory authorities operating on the assumption that both men and women will be working.

As this case demonstrates, the inevitable result of establishing workplace health rules as an accidental by-product of discrimination litigation would be to undermine the work of health and safety agencies charged with assessing and regulating workplace hazards. Resolving these issues in the regulatory forum intended by Congress, in contrast, would facilitate comprehensive risk management that would consider the risks of employment, the overall benefits and detriments of various policy alternatives, and all technologically feasible options for reducing risks.



ARGUMENT

Sex discrimination, like race discrimination, is a recognized economic evil, contributing materially to the depressed economic status of women and the families who depend on them. In recognition of this fact, Congress enacted Title VII and subsequently amended it to clarify that the statute prohibits "discrimination [against working women] on the basis of their childbearing capacity [and that it does so] for all employment related purposes."

Denial of employment opportunity in the name of health protection (for the fetus) was a familiar rationale for denying women employment opportunities, and it was raised in the legislative debates over the Pregnancy Discrimination Act (PDA). The Chamber of Commerce opposed the PDA on the ground, *inter alia*, that it "would prevent an employer from refusing certain work to a pregnant employee where such work posed a threat to the health of either the mother-to-be or her unborn child...[I]njury to the fetus might give the child a cause of action against the employer...Senator Hatch pursued the issue:

Senator Hatch. Do you think there would arise a whole slew of OSHA problems, occupational safety and health problems as a result of pregnant women?

Dr. Hellegers...[Hazardous] agents are just as likely to affect the ovaries of non-pregnant women and there are in fact today companies that will not hire women on that specific basis.

But you never dream of thinking that the same agents may also affect the testicles of men. So if we are talking about untoward effects of industrial processes on human procreation, we have to look at the effects on testicles, the effects on ovaries and the effects on fetuses, all three, and we aren't doing much of that.

As the exchange suggests, where protection is necessary, it is required for both sexes. That was, in any event, the plain legislative commitment expressed in the PDA; the standard governing employment of women "affected by pregnancy, childbirth, or related medical conditions" is "ability or inability to work".

Congress endorsed non-discrimination for wom-

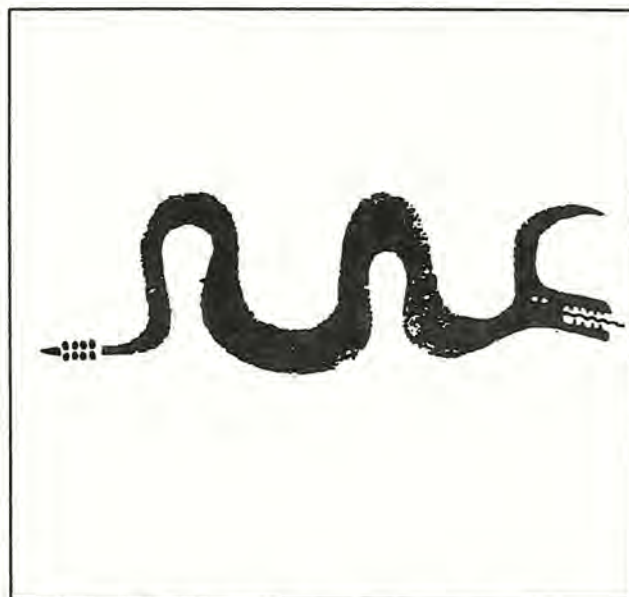
en workers and rejected the proposition that women can be denied employment opportunities to "protect" them from potentially hazardous employment. The OSH Act requires employers to maintain a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm,"...and it requires the Secretary of Labor to promulgate health and safety standards that assure, to the extent feasible, "that no employee will suffer material impairment of health or functional capacity"...Congress therefore had good reason, in 1978, to assume that the workplace would be safe for working women, pregnant or not, and that questions about how to accomplish this result would be addressed through the regulatory mechanisms that had been established to research and control work-related hazards.

An exception to the non-discrimination principle to protect the health of any group of workers was thus unwarranted. Indeed, OSHA was required to protect workers even in the face of scientific uncertainty by relying on the "best available evidence"...and was not to "be paralyzed by debate surrounding diverse medical opinion."

Title VII litigation was thus never intended to be a forum for addressing occupational health and safety issues or for identifying groups of workers who may require additional protection from occupational hazards.

The Court of Appeals' misapplication of Title VII law enmeshed it in a factual dispute over the scientific validity of Johnson Controls' policy. This was plainly unnecessary to resolve the Title VII issues...Of equally great significance is the fact that this approach has vast negative implications for protection of worker health, by allowing courts to make determinations about what is "safe" for whole subclasses of the employed population on the basis of private litigation, the focus of which is an entirely different and more limited set of issues and interests.

This concern is more than just speculative. Indeed, it is borne out in this case by the Court of Appeals' acceptance of Johnson Controls' contention that its policy is justifiable because fetuses are especially at risk, when federal health regulators have concluded that men, women and fetuses all require



the same degree of protection from the hazardous effects of lead exposure.

In 1978, OSHA promulgated a Final Standard for Occupational Exposure to Lead. The agency conducted one of the most comprehensive rulemakings ever undertaken in the occupational health context...Its findings were exhaustive and were sustained on appeal...

The position now advanced by Johnson Controls was pressed in that rulemaking by the Lead Industries Association. Industry representatives argued, precisely as Johnson Controls does now, that the fetus is differentially susceptible to injury to lead and that fetal safety can only be assured if women of childbearing age are excluded from employment altogether.

OSHA considered the matter at some length [and]... rejected the industry position:

The record in this rulemaking is clear that male workers may be adversely effected by lead as well as women. Male workers may be rendered infertile or impotent, and both men and women are subject to genetic damage which may affect both the course and outcome of pregnancy. Given the data in this record, OSHA believes there is no basis whatsoever for the claim that women of childbearing age should be excluded from the workplace in order to protect the fetus or the course of pregnancy.

Indeed, OSHA's concern about the reproductive effects of lead is reflected in provisions of the Stan-

dard that provide an extra measure of safety for both males and females planning to have children, an approach more protective than that adopted by Johnson Controls. (...OSHA requires that even if air levels are within the permissible exposure limits, respirators be made available to workers, both males and females, who "intend to have children in the near future and want to reduce the level of lead in [the] body to minimize adverse reproductive effects."... Respirators can effect a reduction of air lead exposure by a factor of 10 to 2000...Medical removal protection is also available to reduce worker lead levels...)

The Lead Industries Association specifically challenged these findings and other aspects of the Standard...The Court of Appeals for the District of Columbia characterized the challenge as "an attack on the scientific accuracy of OSHA's studies"...and noted that OSHA had "abundant support" for its conclusions. The Court upheld the "reasonable and conscientious interpretations of the agency..."

The court below ignored OSHA's conclusions, stating that the lead standard is outdated...New developments have indeed confirmed the universal nature of the risks posed by lead at lower levels. The court below addressed some of those new developments, but not all.

The EPA has recently reviewed the developments in knowledge about lead's toxic effects in its on-going regulation of the content of lead in fuel. It cited "newly developed information" establishing a relationship between exposure of adult males and

cardiovascular disease....

In sum, the lower court's conclusion that the fetus is vulnerable to injury from lead at workplace levels that are "safe" for adults simply has no support in the public record, and health regulators have plainly concluded that the contrary is true. While some might make a value judgment that fetuses should be protected, even when human beings remain at risk, Title VII makes the decision selectively to protect the fetus in utero a sex-discriminatory act,...and the OSH Act commands that employers protect the health of both working men and women.

The contrast between the record created by OSHA and EPA and the record in the court below demonstrates some of the difficulties of setting occupational health rules through private litigation. Here, the employer's sole concern was to win justification for a previously adopted policy, which had resulted in the sterilization of a least one woman worker...not to explore the hazards of the workplace and devise rational policy. (If anything, the employer had an incentive to conceal all risks except the one it has, for whatever reason, chosen to recognize.)

[Research experts] Bellinger and Needleman note the significance of recent data demonstrating "an association without apparent threshold between exposure to lead and blood pressure in adult males" and suggest that future research will further confirm the harmful effects of lead at very low levels on male reproductive function. As a result, they conclude: "We do not believe that present data provide a sufficient scientific basis for applying different lead exposure standards to male and female workers."...They specifically repudiate any inference that men exposed to low levels of lead, or their offspring, are safe because such a conclusion "is without logical foundation and insupportable on empirical grounds." (Scientific uncertainty compounds the difficulties created by the lower court's misallocation of the burden of proof...Even assuming, *arguendo*, that the BFOQ defense could be applied in this context, the employer would be required to prove that men are not at risk in order to justify a sex-based policy. Instead, the Court of Appeals required the victims of proven discrimination also to prove that the employer's acts were unjustifiable, by affirmatively proving the risk to the children of male workers. In the ab-



sence of equivalent evidence of risks to men, this showing could not be made. The employer would then be permitted to maintain the discriminatory policy, effectuating the scientifically invalid "negative inference.")

Similarly, Dr. John F. Rosen, an amicus herein, and head of the Centers for Disease Control ("CDC") Childhood Lead Poisoning Prevention Ad Hoc Advisory Committee, which advised the CDC on its Statement Preventing Lead Poisoning in Young Children (1985), also cited by Johnson Controls, repudiates Johnson Controls' position. He believes that Johnson Controls' reliance on the CDC report is misplaced. The CDC looked only at the devastating effects of lead on children and concluded that all exposures should be reduced. A study focussing on other subgroups in the population, such as males with high blood pressure or otherwise at risk of cardiovascular disease, would undoubtedly render a similar recommendation for that population...

The narrow litigation focus led the employer (and the court) to ignore federal health agencies' findings, to misconstrue evidence, to cite data selectively, and to rely on testimony contradicted in the public record. The improper grant of summary judgment exaggerated the problem but did not create it; even a full trial could and should not convert a Title VII case into a forum for addressing occupational health policy.

The case-by-case approach to occupational safety issues would generate conflicting decisions, as has already occurred with regard to Johnson Controls' policy. The California Court of Appeals recently decided that Johnson Controls' refusal to hire a fertile woman, pursuant to the same policy at issue here, violates state law. Johnson Controls v. California Fair Employment & Housing Comm., 218 Cal.App. 3d 517 (1990). That court disagreed with the Seventh Circuit about the scientific validity of the policy, relying heavily on the findings made by OSHA.

Unlike the Seventh Circuit, the California court incorporated the technical assessments made by OSHA and did not attempt to replicate an extensive and technical process that poses unacceptable demands on both the litigants and the courts, for which, as this case reveals, they are ill-equipped.



Johnson Controls' policy creates additional risks for women workers as well as their current and future children. Unemployment, under-employment and the resulting poverty occasioned by the denial of desirable employment to women workers can have disastrous effects on children and the health of pregnant workers, as Congress specifically recognized in its deliberations about the importance of full employment opportunities for women. In Title VII, Congress struck the balance so as to recognize these considerations and to allow women to make employment-related risk determinations for themselves. Thus, the difficult half of the excess risk calculation...has already been addressed, a fact the lower court failed to appreciate. (Industrial employment is particularly important for unskilled and uneducated women, for whom few other employment opportunities are available at decent wages. In addition to loss of income, women may lose insurance benefits and suffer in their nutrition, housing, and general level of wellbeing, if they are denied this type of employment...)

...The decision below would permit decisions based on specific evidence of implementation costs. This result rewards the least efficient employers and discourages innovation in the industry as a whole. Individual employers may not always be motivated to explore innovative approaches to workplace safety problems precisely because they are likely to cost something to implement and may disrupt production.

Regulatory agencies develop policy based on in-

dustry-wide cost/benefit and [sic.] considerations. OSHA is directed to develop "innovative methods, techniques, and approaches for dealing with occupational safety and health problems"...The feasibility requirement of the statute is directed to the industry as a whole, and not to individual employers, precisely because the goal is to institutionalize the best technology available, rather than the worst.

Regulatory agencies have access to a broad base of information about technology that is currently available or in development, have the expertise to evaluate its uses, and can assess costs and feasibility for the industry as a whole. The decision below fails to account for specific proposals in the industrial hygiene literature for methods of reducing lead exposures in battery-making facilities. Ventilation, engineering controls, isolation of certain tasks, air plenums, and vacuum systems are among the techniques recommended in standard texts, and more innovative approaches are being explored. Knowledge of all these developments is critical to risk management as well as the feasibility assessment under OSHA.

These principles explain why Johnson Controls is obligated to seek guidance from OSHA in achieving compliance with the Lead Standard or improving on it. For example, OSHA is undoubtedly aware of the substantial body of scientific evidence on substitutes for lead-acid batteries...

There is a substantial federal effort to study new battery technology for all applications....

Even if various alternatives and control technol-

ogies were not possible, and this type of work could not be made safer, there would still be no basis for "solving" the workplace health problem by arbitrarily discriminating. This situation would represent the quintessential risk management problem that must be resolved on a national level, by a determination whether the product is essential, whether it should be banned, or whether public funds should be expended to reduce or insure risks if the barrier to safety is cost-based. These decisions will depend on as objective an assessment as possible of the precise nature of the risks and the state of technology for reducing them, as well as policy considerations. As this Court has noted, reviewing technical arguments, balancing competing interests, or creating "high policy" is the business of elected representatives...

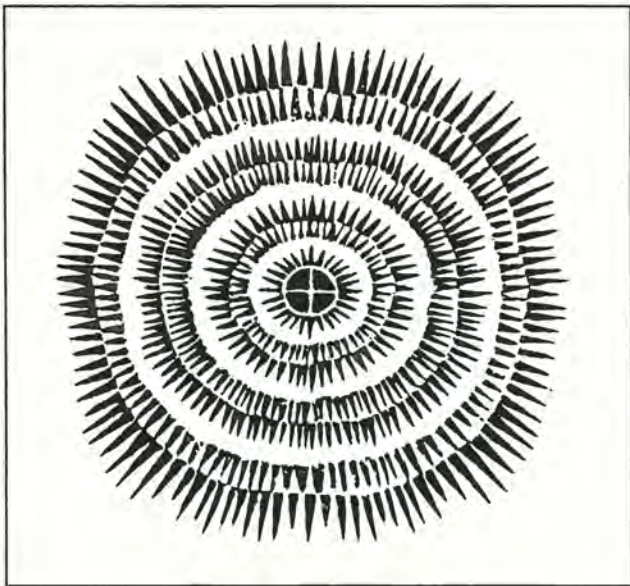
Wherefore, amici urge the Court to reverse the decision of the Seventh Circuit and remand with instructions to enter judgment for petitioners.

EMPLOYMENT FOR A DECADE OF SOCIAL CHANGE: THE PUBLIC INTEREST LAW CAREER FAIR

A National Public Interest Law Career Fair will be held on Friday, October 19, 1990 at the Washington Court Hotel in Washington, DC. The event is co-sponsored by the National Association for Law Placement and the National Association for Public Interest Law (NAPIL), an association of student-funded public interest grant programs which provide over \$1 million in summer and post-graduate grants for law students working with public interest organizations.

Last year, nearly 1,000 employers, students and graduates participated in the Fair, and attendance is expected to exceed this level in October. The Fair includes opportunities for both informal information exchange and individual interviews. Throughout the day, students and graduates will browse and meet with employers in an arena format. In addition, employers will hold individual interviews on both Friday and Saturday.

The Career Fair will be followed by NAPIL's



Sixth Annual Public Interest Law Student Conference on Saturday, October, 20, and Sunday, October 21. The theme of the Conference, held at Georgetown University's Law Center, is "Looking Forward to a Decade of Social Change." Public interest lawyers and law student leaders from NAPIL's 87 student-funded grant programs will be attending the Conference.

"It is both practical and symbolic that we hold the Career Fair and the Conference together," says Michael Caudell-Feagan, Executive Director of NAPIL. "We need to recruit a new generation of law students for public service, so that the 1990s can be a decade when the poor finally receive the legal assistance they so desperately need, and when social justice moves beyond rhetoric and into reality."

The Conference will consist of workshops on current law school issues, such as loan forgiveness programs, the challenge of pluralism to law schools and pro bono and community service programs. There will also be presentations on the current state of public interest law, ranging from women's rights to immigration law, by leading litigators, advocates

and educators.

NAPIL encourages faculty to attend the Conference and to encourage their students to attend both the Conference and the Fair. For registration materials and further information, contact NAPIL at 1666 Connecticut Ave., NW, Suite 450, Washington, DC 20009 • (202) 462-0120.

NOMINATIONS FOR SALT AWARD

If you have a nomination in mind for the Annual SALT Award, please communicate with Richard Chused [(202) 622-6504] or with any Board Member.



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