

SALT EQUALIZER

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SALT EQUALIZER

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

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The SALT Annual Awards Dinner to Honor Quigley, Lewis

Margalynne Armstrong, Santa Clara School of Law



Prof. Bill Quigley, Loyola University, and Congressman John Lewis

Prof. Bill Quigley of Loyola University New Orleans will receive the 2004 SALT Teaching Award and Congressman John Lewis will receive the SALT Human Rights Award at SALT's annual dinner. The SALT banquet will be held on January 5th, 2004 during the AALS meeting in Atlanta.

The SALT teaching award recognizes extraordinary contributions to the teaching mission of the legal academy. Prof. Quigley teaches Poverty Law and other classes and is Director of the Law Clinic and Gillis Long Poverty Law Center at Loyola. Both his teaching and his active career as a social justice lawyer for numerous causes have inspired students to pursue social justice in a wide range of settings. Legal services, death penalty abolition, community organizing, peace activism, and minimum wage issues are just a few of the many areas in which Prof. Quigley has been actively involved.

Awards Dinner continued on page 19

SALT, FAIR Sue Department of Defense over Solomon Amendment

SALT Co-President Michael Rooke-Ley, Seattle University School of Law (visiting 2003-04)

With the help and support of our members all across the country, SALT and a coalition of law schools (the Forum for Academic and Institutional Rights, or "FAIR") have sued the Secretary of Defense and other cabinet officers, challenging their efforts to force us to abandon our long-standing anti-discrimination policies with threats of loss of all federal funds under the Solomon Amendment. The suit was filed on September 19, 2003, in federal district court in Newark, New Jersey, and is being heard by Judge John C. Lifland. As of this writing (mid-October), oral arguments have been made, and we are awaiting the court's ruling on our application for a preliminary injunction and on defendant's motion to dismiss.

[Editors' Note: On November 5, Judge Lifland rejected the Defense Department's motion to dismiss, but also declined to issue our requested preliminary injunction. The coalition plans to appeal the denial of the preliminary injunction.]

Every accredited law school in the nation adheres to a non-discrimination policy that covers race, ethnicity, gender, physical disability, and a range of other characteristics, including sexual orientation. As Boston College law professor (and FAIR founder) Kent

Solomon continued on page 20

Introducing SALT's New Co-Presidents

Raleigh Hannah Levine, William Mitchell
College of Law

In January 2004, Paula C. Johnson and Michael Rooke-Ley will end their tenure as SALT's co-presidents, and Holly Maguigan and José Roberto ("Beto") Juárez, Jr. will take the reins. For Holly, Professor of Clinical Law at New York University School of Law and Acting Faculty Director of the Global Public Service Law Project, the co-presidency is the latest in a long line of SALT service positions. She has been a



Holly Maguigan and José Roberto ("Beto") Juárez, Jr. will be SALT's new co-presidents in January 2004.

member of the SALT board for more than ten years and has been very actively involved in teaching conferences and the Action Campaign, SALT's effort to respond to attacks on affirmative action by taking steps wherever possible to reaffirm the legitimacy of using race- and gender-conscious criteria to increase access and opportunity in law school admissions and throughout the legal profession.

Beto, Professor of Law at St. Mary's University School of Law, has also served on SALT's board, but calls himself a newcomer compared to Holly. He decided to seek a co-president position because "SALT is such an important organization that anything I could do to contribute, I wanted to do." That he has been elected to the co-presidency, he says, "speaks to what

SALT is all about: making it possible for people to achieve what they want to achieve."

As SALT co-president, Beto hopes "to continue to attract lots of people who don't necessarily have support for their goals within their own institutions, but can use SALT's resources to accomplish them." He sees the co-presidents as facilitators whose role is to help SALT members achieve their objectives. After all, he says, "SALT's general members and board members do the real work of the organization; the co-presidents' job is to make it possible for members to do that work." Holly, too, views the co-presidency as a means of advancing the projects on which SALT's members are already working. Rather than an opportunity to change SALT's direction, she sees the co-presidency "as a chance to build on the amazing work that's been done, especially in recent years."

The new co-presidents, too, will have the opportunity to build on the work they've been doing for many years. As legal practitioners, Holly and Beto were already deeply committed to the goals SALT seeks to accomplish. Before she joined the legal academy, Holly spent fourteen years as a public defender and private criminal defense attorney. She sees her work with SALT as complementary: "SALT helps me in my own work to keep issues of race, class and gender bias in the criminal court system at the front and center of my teaching and scholarship," she says.

Beto similarly considers his work with SALT a logical extension of his longstanding dedication to civil rights work. As a staff attorney for the Mexican American Legal Defense and Educational Fund ("MALDEF") in San Antonio, and then as Regional Counsel and Director of the Employment Program for MALDEF in Los Angeles, Beto litigated class actions in employment, education and voting rights. Beto's new role within SALT will also complement his continued involvement in

the LatCrit (Latino and Latina Critical Theory) conferences; recently, SALT and LatCrit have collaborated to conduct a faculty development workshop to support progressive junior faculty and to foster their scholarship in critical outsider jurisprudence, including LatCrit theory. Like Beto, Holly — who is committed to

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SALT is in great shape.
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much."*

maintaining SALT's focus on teacher development — is quite moved that so many SALT members have suggested that they continue to develop SALT's connection with LatCrit. The incoming co-presidents promise to consider such suggestions carefully, and they urge SALT's members to continue coming forward with advice and ideas.

As they prepare to assume the co-presidency, Holly notes, both she and Beto are very excited by the opportunity to collaborate not only with "old friends and new people doing remarkable work," but with each other, given that their "complementary interests seem to be a great match." Beto adds, "The good news is that SALT is in great shape. Any problems or challenges we face come because of our success: We need to use our limited resources as efficiently and effectively as possible because we do so much."

Co-Presidents' Column

Paula C. Johnson, Syracuse University
School of Law
Michael Rooke-Ley, Seattle University
School of Law (visiting 2003-04)



Greetings,
SALT
Members.
At this
writing, in mid-

October, we recently returned to our respective coasts after spending a beautiful weekend in the middle of the country with fellow SALT members. The occasion for our trip to Minneapolis was threefold: an all-day retreat with past SALT presidents, organized by our co-presidents-elect Holly Maguigan (NYU) and Beto Juarez (Mary's), to reflect on directions and priorities for SALT; an all-day workshop on Saturday addressing bar exam alternatives with reform-minded experts from around the country; and, on Sunday, a five-hour board meeting to handle the nitty-gritty details of SALT's ongoing work. We are grateful to former SALT president Carol Thomsky for arranging and hosting all three events at her law school.

At the presidents' retreat, we hoped to create a space to share our experiences and perspectives about the organization across the eras of our terms, and to discuss ways in which we could collectively and individually contribute to the continued vitality of the organization. While many issues that we faced were specific to given periods, we quickly realized that SALT has stayed true to our core mission to remain active on issues regarding legal scholarship and pedagogy, access to legal education, diversity throughout the profession, and broader social justice concerns. We are pleased to report to you that former leaders of SALT remain deeply devoted to our organization and continue to contribute in substantial ways so that we are equipped to meet the challenges of the future.

Our bar exam workshop was organized by Eileen Kaufman and her committee members. As its name suggests, the workshop was a working session that included an array of knowledgeable presenters on testing goals and purposes, and the suitability or unsuitability of certain types of instruments and practices used to determine admission to the bar. In organizing this workshop so that we would be better informed about the issues regarding bar exams, bar admission practices, and alternatives to determining entry to the profession, SALT will be better prepared to speak and act knowledgeably on these concerns. Of course, we will continue to share information and insights on these topics with our members. Thus, just as we have fought tirelessly to preserve affirmative action in legal education, we also must adamantly insist that the door opened at admission is not closed at graduation, keeping law graduates from serving those most in need of legal services. To the extent that our students are subjected to ineffectual ways to determine their ability to practice law upon graduation, we must advocate for better, more pertinent means to assess their professional proficiency to meet the public's legal needs. (For more information on the Bar Exam Workshop, see pages 4-11.)

Lest you think that our gaze has been entirely internal lately, we remind you that the legal team from Heller Ehrman argued our motion for a preliminary injunction against the Solomon Amendment on October 9th, on behalf of the FAIR and SALT plaintiffs. In joining this lawsuit challenging the constitutionality of the Solomon Amendment, SALT is at the forefront of a principled and activist stance against employment discrimination directed at our gay, lesbian, bisexual and transgender communities by the U.S. military. We fully anticipate a victory that restores the academic freedom of law

schools and all institutions of higher learning to uphold their non-discrimination policies against forced bigotry. (See article on our Solomon challenge, page 1.)

At this point, we hope you will indulge a little reflection on our part, as this is the last column we will write as co-presidents of SALT. Over the last two years, SALT has been intensely involved in struggles over affirmative action, LGBT rights, judicial nominations, peaceful resolution of international conflict, and preservation of civil liberties and constitutional rights during and after an ill-conceived and lingering war initiated by our country. Throughout it all, we have enjoyed your guidance and support in meeting these challenges. It is clear to us that a deep reservoir of good will, critical thinking, and strong activism among SALT members will make SALT a leading voice for progress, accessibility, and inclusion in our profession and society for the foreseeable future. Therefore, as ever, we call on you to continue to help SALT remain strong internally and externally, with your ideas, financial support, and active participation.

We hope that you will join us at SALT events during the AALS Annual Meeting in Atlanta in January, 2004. Bring your colleagues — especially new ones — with you to the New Teachers Reception, Cover Workshop, and of course, Annual Awards Dinner, when we will honor Professor William (Bill) Quigley, Loyola, New Orleans, with the SALT Teaching Award, and Congressman John Lewis (D-Ga.), with the SALT Human Rights Award.

Finally, we close to wish you and all those dear to you the very best in the coming New Year, and we thank you for giving us the privilege of serving as your co-presidents these past two years.

Peace,
Paula and Michael

Mini-Conference on Bar Exams

SALT Bar Exam Workshop

By Eileen Kaufman, Truro Law School

On October 11, 2003, the SALT Board held a workshop at the University of Minnesota Law School entitled "Re-Examining the Bar Exam, Part II: A Workshop to Explore Alternative Licensing Approaches." This workshop represents the beginning of the next phase of SALT's long standing commitment to ensure that the bar examination serves as a reliable and valid



Phoebe Haddon and Eileen Kaufman

measure of professional competency and that it does not serve to impede the diversity of the profession.

For many years, SALT has been raising questions and concerns about the bar exam as it is currently administered, particularly with respect to 1) whether it is a good measure of professional competence, 2) the extent to which it is inappropriately driving a whole host of programmatic and pedagogic decisions

within law schools, and 3) the extent to which it disproportionately excludes racial and ethnic minorities from the practice of law. These were among the issues SALT explored in 1999 at its first bar exam conference, entitled "Re-Examining the Bar Exam." Two years later, SALT published its critique of the bar exam (*SALT Statement on the Bar Exam*), which was widely distributed to bar examiners, state judges, academics, bar leaders, and bias commissions, and ultimately was published in the *Journal of Legal Education*. For the past several years, SALT has played a leading role in raising serious questions about psychometrician Stephen Klein's research methodology. Klein's work has led to proposals in many states to increase their passing bar score.

Critiquing the bar exam, of course, is the relatively easy part. We have known for some time that eventually we would have to do the hard work of formulating alternatives to the bar exam and evaluating their validity, reliability and feasibility. The October 11, 2003 workshop was the first step of that larger project.

The workshop was deliberately designed to be small in order to enable active learning and discussion. The SALT Board met with experts from around the country (and one from Canada) to participate in a discussion about alternative means of assessment and ways in which some jurisdictions are re-thinking the way they assess competency.



Holly Maguigan, Fran Ansley, and Roberto Corrada

The Community Legal Access BarAlt Program

Sally Simpson '04, University of Arizona
James B. Rogers College of Law

The Community Legal Access BarAlt proposal (CLABA) — a proposal under development by the Community Legal Access Society, a student organization at the University of Arizona — advocates a one-year, post-JD apprenticeship program that would provide reduced-fee legal services to the unrepresented lower-middle income and modest means populations while serving as an alternative method for first-time attorney licensure and bar admission. CLABA is designed to address acknowledged legal service gaps, ease transition issues from law school to practice, enhance public confidence in legal practitioners, and offer an alternative evaluation methodology for legal licensure.

CLABA anticipates creating a free-standing 501(c)(3) "Institute" as a fully staffed office with flexible hours that would act as a community and professional resource while covering a wide spectrum of practice areas, including family law; personal finance and planning; personal and economic injury; business finance and planning; government regulation; and criminal defense. Individuals, small businesses, and not-for-profits with income of roughly \$15,000 to \$60,000 — a demographic that is demonstrably underserved in the full spectrum of legal practice areas appearing on traditional bar examinations — could be eligible for legal counsel and representation. Fees likely would range from \$15 to \$35 per hour with some caps.

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Georgia's Public Service Bar Exam Alternative

Andrea Curcio and Clark D. Cunningham,
Georgia State University College of Law

Inspired by the work being done in New York and Arizona, we have begun a discussion in Georgia about a possible public service alternative pilot program focused on the criminal justice system. Law school graduates would spend four months doing indigent defense and two months in a prosecutor's office. Licensees would begin with a short intensive course in Georgia criminal practice and procedure that might be supplemented with ongoing simulation-based education during the six-month program. The potential licensees would learn basic law office procedures and perform factual investigation, client interviewing and counseling, research and writing, negotiation, and considerable courtroom advocacy by participating in proceedings such as bond motions, preliminary hearings, probation revocations and perhaps even part of one or more trials. They would be evaluated on each of these skills, by both their immediate supervisor and an outside assessor. Those who demonstrated competence as well as professionalism in each area as well as throughout the program period would be licensed.

Such a proposal would, we hope, draw support from two on-going initiatives that have very strong commitments from both the organized bar and the state supreme court: professionalism and indigent defense. The Georgia Supreme Court appointed the country's first state professionalism commission, which is personally chaired by the chief justice. The

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Identification and Development of Predictors for Successful Lawyering

Marjorie M. Shultz, University of California at Berkeley, Boalt School of Law
Sheldon Zedeck, University of California at Berkeley, Department of Psychology

I. Overview

A project entitled "Identification and Development of Predictors for Successful Lawyering" was funded by the Law School Admission Council (LSAC) beginning in July 2001 and the investigation is led by Co-Principal Investigators Sheldon Zedeck and Marjorie Shultz. The overall goal of the project is to develop predictors of attorney competence that could be used in choosing which applicants to admit to law school. In order to develop such predictors it was necessary first 1) to define what factors are important to lawyering effectiveness and 2) to specify methods for measuring those factors. Phase I has undertaken and completed those tasks. The task in Phase II (now underway) will be to identify and select (or develop) predictive tests that can be administered to law school applicants in order to predict their potential competence as lawyers. The Effectiveness Factors identified in Phase I tell us what the tests to be developed in Phase II should seek to predict. The Phase I factors and measurement scales will enable us to assess whether the tests that we choose or create in Phase II do in fact predict the competencies that were identified in Phase I as vital to effective lawyering.

"Selecting prospective lawyers on the basis of a broader range of competences should improve the profession's performance of its many tasks in society and in the justice system."

II. Rationale for the Research

Prevailing Practice: The Role of Law Schools and the LSAT in Determining Who Becomes A Lawyer

Law schools not only choose law students, they are the main gate-keepers when it comes to deciding who becomes a lawyer. The vast majority of law school graduates practice law. Despite their character as professional schools, law schools actually rely more heavily on academic criteria in making admissions decisions than do graduate departments that train people primarily for academic careers. Law school admissions decisions are heavily influenced by scores on the LSAT (and undergraduate GPA, through the index score). These measures aim to assess school-oriented cognitive skills. By its own description, the LSAT seeks to evaluate only reading, analytic and logic-based skills. Standardized test scores on those skills are in turn designed to predict grades in the first year of law school. The LSAT is a moderately effective predictor of 1L grades; it explains roughly 25% of the first-year grade

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Mini-Conference on Bar Exams

British Columbia's Bar Admission Program

Alan Treleaven, Director of Education and Practice, Law Society of British Columbia

The B.C. Bar Admission Program is administered by the Law Society of B.C. to train and accredit law school graduates to be professional, efficient, competent, and ethically aware lawyers. The Program is the sole means for obtaining admission to the BC bar, other than by way of transfer from other jurisdictions. Admission to the bar is controlled exclusively by the Law Society pursuant to provincial statute.

The Program includes the articling term and the mandatory Law Society training course and assessment term, known as the Professional Legal Training Course ("PLTC"). For each student, the nine-month articling term takes place in the office and under the supervision of a lawyer approved by the Law Society for that role, based on the lawyer's experience and practice record. At the conclusion of the articling term, the supervising lawyer is asked by the

Law Society to certify whether the student has completed the articling term, and is of good character and fit for admission.

Each year, the PLTC runs three times in Vancouver and once in Victoria. The course is ten weeks long, Monday through Friday, with both morning and afternoon sessions on most days. Attendance is required. Class size is typically twenty students with one full-time faculty member in each classroom throughout the term. Faculty members are experienced lawyers and teachers. Their instruction is supplemented periodically by volunteer guest instructors from the practicing bar. The highly interactive curriculum is designed around professionalism, lawyering skills and applied knowledge of substantive law and procedure.

"The broader objective for students is to be able to perform lawyering skills competently, integrated with knowledge of law and procedure and a demonstrated awareness of professional responsibility."

While PLTC is a skills-based course, the skills taught and practiced are inseparable from a context of knowledge and attitudes toward the practice of law. The broader objective for students is to be able to perform lawyering skills competently, integrated with knowledge of law and procedure and a demonstrated awareness of professional responsibility. PLTC focuses on the skills of advocacy, writing, interviewing, drafting, legal research, alternative dispute resolution, and problem-solving. In addition, PLTC focuses on professionalism (professional responsibility, law office management, and trust accounting); and files/transactions (residential conveyance, civil trial, criminal trial, buying and selling a business, family law (separation and divorce), securing personal property, will preparation and probate, incorporating a business, and builders lien claim). Professional responsibility, law office manage-

SALT Bar Exam Workshop:

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Our first speaker was Alan Treleaven, Director of Education and Practice for the Law Society of British Columbia, which is the self-regulating body that governs the legal profession and the practice of law in the Province of British Columbia. His primary responsibilities include bar admission education and licensing, post licensing education, and competence support for lawyers. Alan described British Columbia's post graduate skills training and assessment program. Of particular



Carol Chomsky, Beto Juarez, Stephanie Wildman, and Margalynne Armstrong

relevance was his explanation of the ten week Professional Legal Training course, in which students learn a range of skills interactively and then are rigorously tested on groupings of skills such as advocacy, drafting, interviewing, and writing. A more comprehensive description of Alan's presentation can be found in his article "British Columbia Bar Admission Program" on page 6.

Greg Munro joined Alan Treleaven on the first panel to describe his work developing reliable and valid measures for assessing skills at the University of Montana School of Law. Greg is the author

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OUTCOMES ASSESSMENT FOR LAW SCHOOLS and the Director of Professional Skills at Montana. Greg described how Montana has integrated the MacCrate skills throughout its curriculum and has worked to develop valid, reliable and fair methods of assessing those skills.

The final speaker on the first panel was Sheldon Zedeck, who is a Professor of Psychology at the University of California at Berkeley. Shelly has been working with Professor Marjorie Schultz (Boalt School of Law) to identify criteria of lawyering success and to develop and validate tests that can be used in the admissions process to select applicants who can best succeed in the full range of lawyering skills. Their work, which is described more fully in their article entitled "*Identification and Development of Predictors for Successful Lawyering*" on page 5, can serve as a foundation in SALT's effort to explore alternative licensing mechanisms that more accurately relate to and predict competence to practice law.

One message from this first panel was that law schools can and should do a better job teaching and assessing the full range of skills that lawyers actually need. With few exceptions, the required curriculum at most law schools relates only to knowledge, and not to the skills and values recognized in the MacCrate report. Secondly, the bar exam, in whatever form, must assess those lawyering skills. In other words, the exam that purports to measure minimal competence to practice law in an unsupervised setting must actually address the skills that make up the practice of law. It seemed clear from listening to the morning panelists that considerable work has already been done to develop the assessment tools that can be used to evaluate those skills.

The second panel included presentations from Kris Glen (Dean at CUNY) and Sally Simpson (third year student at the University of Arizona College of Law) about two concrete alternatives to the bar exam. Kris described the Public Service Alternative Bar Exam, where students would rotate among several parts of the civil court system. Kris' proposal, which is described in "*When and Where We Enter: Rethinking Admission to the Legal Profession*," 102 COLUMBIA L. REV. 1696 (2002), calls for students to spend approximately ten to twelve weeks assisting



Sophie Sparrow and Joan Howarth

the courts while being evaluated on a broad range of the MacCrate skills. Kris emphasized that the Public Service Alternative Bar Exam is a performance test, not a training program. Kris utilized Title VII analysis in formulating her proposal, based on the requirement that employment tests be related to job performance. The Public Service Alternative Bar Exam is a better bar exam, Kris explained, because it measures more of the skills required of lawyers than the traditional bar exam, and is less likely to create a disparate racial impact.

Sally Simpson, the final speaker of the morning, described her efforts in Arizona to develop CLABA, the Community Legal Access BarAlt. This proposal would place law graduates in a year-long apprenticeship in which they would deliver reduced fee legal services to clients who are just

above the poverty line, and therefore ineligible for free legal services. The participants would rotate through a number of practice settings and receive training and supervision from experienced attorneys. Her proposal is described more comprehensively in her article entitled "*The Community Legal Access BarAlt Program*" appearing on page 4.

The afternoon workshop consisted of discussions about reform possibilities in a number of jurisdictions, including Nevada, New Hampshire, Georgia, New Mexico, and Arizona. Andrea Curcio and Clark Cunningham described the possibility of creating a bar exam alternative that helps to improve indigent defense in Georgia. Their ideas are described in "*Georgia's Public Service Bar Exam Alternative*" on page 5.

Just as the Board was impressed by the morning panelists' description of the work being done to develop training and assessment models, we were impressed by the creative efforts underway throughout the country to formulate alternatives to the bar exam. SALT has identified a number of tasks that need to be completed to move this project ahead, including:

- *develop a template for assessing lawyer competence;
- *develop assessment models;
- *mobilize students;
- *gather and make available information about skills assessment and alternative licensing proposals; and
- *investigate foundation support for funding an alternative licensing proposal.

A bibliography related to formulating alternatives to the bar exam can be found on the SALT Web site. Anyone interested in participating in the ongoing project of SALT's bar exam committee, should contact Eileen Kaufman at eileenk@tourolaw.edu.

Mini-Conference on Bar Exams

BarAlt:

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Eighteen CLABA apprentices, who would be employed by the Institute and paid between \$19,000 and \$24,000 for the year, would rotate in groups of three through the six core practice areas, with each rotation lasting eight weeks. Each practice area would be headed by a trained, full-time lawyer-mentor recruited from a pool of active professionals who demonstrate significant depth and breadth of experience as well as high ethical values. These lawyer-mentors would oversee case management, serve as attorney of record, and act as coaches and resources for apprentices to ensure that all clients receive diligent, competent counsel and representation. The lawyer-mentors would also conduct competency-based performance evaluations throughout the rotations. Apprentices would be evaluated on legal analysis, legal research, problem-solving, oral and written communication, fact investigation, negotiation, client counseling, alternative dispute resolution, time management, and the recognition and resolution of ethical issues, in addition to their knowledge of black-letter law. Assessment tools would include both subjective and objective evaluation, using

direct observation, "standardized" clients, case file audits, peer review, current and follow-up client satisfaction surveys, and other rating and ranking mechanisms.

Client and case assignments would remain with the original apprentice and lawyer-mentor despite the apprentice's rotation to another practice area. At the end of the year, clients with active cases would be transitioned to an incoming

"[The program] is designed to address acknowledged legal service gaps, ease transition issues from law school to practice, enhance public confidence in legal practitioners, and offer an alternative evaluation methodology for legal licensure."

apprentice or to the lawyer-mentor of record for the case. CLABA generally would not accept cases that were expected to last more than one year, and other risk management limitations would apply.

Before they were accepted into the CLABA program, apprentices would be required to have graduated from an ABA-accredited law school with the equivalent of a

minimum GPA of 2.75; to have completed required core classes; and to have passed the MPRE as well as the jurisdiction's character and fitness screening process. At the end of the year-long apprenticeship, if all evaluations were satisfactory, the apprentice would become a licensed attorney. If the program ejected an apprentice for any reason, he or she would be able to take the jurisdiction's written bar exam to attempt licensure.

Although client fees would offset a substantial portion of the Institute's

operating expenses, other funding would be required. CLABA would not divert resources from legal aid for the poor, nor accept funding that could compromise program integrity. CLABA anticipates a balanced portfolio of national, state, and local as well as private and public funding sources, with minimal reliance on government funds.

As of October 2003, Arizona's CLABA proposal is finishing review by its State Bar's *Public Service/Special Admissions Task Force*, and is slotted for initial presentation to the State Bar's Board of Governors in November. For more information on CLABA, please visit www.law.arizona.edu/depts/claba/.



Phoebe Haddon, Stephanie Wildman, and Joan Howarth



Margalynne Armstrong

British Columbia:

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ment and taxation issues are woven throughout the course, including the skills practice exercises.

Students complete assignments outside of class time to help prepare for their skills assessments and for the practice of law. Assignments are returned to students with detailed feedback. Live performances are completed through simulation, and are usually videotaped.

Skills assessments represent two-thirds of the PLTC testing. During an assessment, PLTC's role changes from coaching and helping to grading. The assessments are the assurance that the student can perform the skills of an entry-level lawyer without assistance or supervision. The four skills assessments are in advocacy, client interviewing and advising, writing, and drafting. The skills guide for each of the skills is used to grade the performance. The skills are integrated with substantive and procedural law, and professional responsibility, and so these areas also form a part of the assessment. For example, in the Interviewing Assessment, if the interviewing techniques are sound, but the student demonstrates insufficient knowledge of the substantive law to question or advise the client effectively, the performance is assessed as a fail. Likewise, a failure to recognize and deal appropriately with a key professional responsibility issues in any skills assessment counts toward a fail.

The two-part Qualification Examination tests applied understanding of substantive law, practice and procedure. Both of the three-hour examination parts cover a mixture of barristers' and solicitors' work. Part I covers commercial law,

Georgia:

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professionalism commission is currently trying to implement a mentoring program for new lawyers that grew out of an unsuccessful proposal, made by a state bar president several years ago, to require an apprenticeship period. Georgia has adopted the MultiState Performance Exam, instituted a one-day mandatory Bridge the Gap course, and requires lawyers to certify that they have participated in or observed nine litigation experiences (including five jury trials) before they are permitted to appear as sole or lead counsel in court. The bar exam alternative should be appealing as an even more reliable way to assure that new lawyers have appropriate professional skills and values.

The Georgia Supreme Court has also appointed a blue ribbon commission on indigent defense, which issued a comprehensive report last year calling for a massive increase in state funding and for a uniform system of statewide standards. The chief justice and state bar strongly

supported the report. Last session, a bipartisan coalition passed enabling legislation adopting most of the commission's recommendations, though in the midst of a state budget crisis, the legislature's resolve to provide adequate funding is now in doubt. The bar alternative proposal would both supplement the provision of indigent defense and increase the supply of well-trained and motivated future public defenders.

The next step in this process will be a one-day conference on alternative methods of training and licensing new lawyers, informed by the experience of the medical profession and of the legal profession in other countries, to be held in Atlanta on January 29, 2004. The conference is sponsored by the Georgia State Law Review and will form the basis of its annual symposium issue. Lead articles in draft form will be available on the web by December 2003. Registration is free and attendance from around the country is encouraged. For more information, visit: <http://law.gsu.edu/ccunningham/Professionalism/>

company law, creditor's remedies, and criminal procedure. Part II covers civil litigation, family law, estates (wills and probate), and real estate. Both cover associated issues law office management, professional responsibility and tax. The Qualification Examination differs from law school examinations, in that the question types focus on one or two issues, and include mostly short answer essay or short fact patterns requiring analysis and problem-solving. Students are asked to solve the problem or explain how to

proceed in a transaction, and to explain their answer.

To achieve a pass standing a student must successfully pass the four skills assessments and each part of the Qualification Examination. On skills assessments, students must achieve a minimum of 70% to pass. On the Qualification Examination, students must achieve a minimum of 60% on each part to pass.

For further information, please contact the writer: atreleaven@lsbc.org.

Mini-Conference on Bar Exams

Predictors:

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variance, leaving approximately 75% unexplained. The LSAT has been the most effective method yet developed to predict first-year law school grades. At the same time, it is narrow in method and in goal. To base admission to law school mostly on LSAT scores is to choose academic skills (and only a subset of those) as the primary determinant of an applicant's qualification to enter professional training and work.

Reasons to Develop Additional Ways to Assess Law School Applicants

Scholars and commentators on legal education have urged that the criteria of merit for admission to law school should be broadened beyond those evaluated by the LSAT and other academic indicators such as undergraduate GPA. But no one has yet developed reliable ways of either identifying or assessing other relevant skills. Our project seeks to do both.

Predicting Lawyer Effectiveness as well as Law School Grades

The project, if successful, could enable law schools to select better prospective lawyers who have both academic and professional competencies. Selecting prospective lawyers on the basis of a broader range of competencies should improve the profession's performance of its many tasks in society and in the justice system. Because research shows that racial groups are substantially similar in actual job performance, we believe the project might also increase the racial diversity of the pool of students admitted to law school. At the same time, a choice to add selection criteria that focus on predicted

professional effectiveness is both justified and principled in terms of the role of law schools in choosing and training society's lawyers.

III. Research Design Phase I (2001-2003)

Phase I identified the range of competencies needed to be an effective lawyer and developed methods to assess people in regard to those professional work factors. The products of Phase I are: 1) a comprehensive list of twenty-six Effectiveness Factors that are important to effective

"We believe the result of this research would be to select better lawyers in a more principled way than is available to law schools today."

lawyering; and 2) a set of 715 behavioral examples of performance that describe or illustrate poor to excellent performance on the twenty-six factors. These descriptive examples enabled us to create the next product: 3) a number of flexible Behaviorally Anchored Rating Scales (BARS) that an evaluator could use to assess the effectiveness of any given practicing lawyer. The products from Phase I provide the informational foundation that is necessary for Phase II.

People affiliated with Boalt provided the material to create these products through individual interviews, focus group interviews, and a large sample questionnaire. The research participants included judges, clients, students, faculty, and

lawyers in many practice fields, at various career stages, and in various career settings. At this stage, for reasons of practicality, we have centered only on Boalt and its constituents, but we expect that our results and approach will be useful to other schools as well.

Phase II (2003-2005)

In Phase II, we plan to develop tests that can, to some useful degree, predict who has the potential to excel in the factors identified in Phase I. In choosing tests, we will both identify and adapt existing tests that are productive for these purposes and we will create new tests designed specifically with this goal in mind. The tests chosen or designed for applicants will not be based on legal knowledge or lawyering experience per se. Rather, they will seek to predict who will have and/or could develop the competencies identified in Phase I as essential for effective lawyering.

Once possible tests have been chosen, we will assess whether performance on those predictor tests correlates with actual lawyering effectiveness. This validation process will involve several steps. 1) After we choose and/or develop the predictor tests, we will administer those predictor tests to a sample of practicing lawyers; 2) we will have supervisors of those same individuals evaluate their effectiveness in professional practice, using the factors and scales identified in Phase I as tools for measurement; 3) if people who score high (or low) on given predictors of given factors also receive correspondingly high (or low) evaluations in ratings of their effectiveness on those factors in practice, we will have demonstrated the necessary correlation between the predictor test(s) and actual lawyering competence. We

expect that some of the factors will be more readily predicted than others, and that some tests developed in this phase will be discarded as not sufficiently valid.

We expect to do a similar validation study on upper-division law students, administering the predictor tests to 3L law students, and then having faculty assess (to the extent that the academic or clinical setting allows them sufficient exposure to the student's work) the effectiveness those students demonstrate in their final year of professional training.

IV. Summary

In sum, Phase I has been completed. Phase II will choose and/or develop predictor tests that are appropriate to measure the potential of law school applicants and then check to see that the predictors actually correlate with lawyering competence as defined by the factors and measured by the rating scales developed in Phase I. Once the Phase II tests are developed and validation data have been assembled, law schools could use the results to select components of a "lawyering effectiveness index score" to aid in their admissions decisions. Adding such predictors to the selection process would broaden the operative definition of merit to include not simply academic factors (LSAT and undergraduate GPA) but also professional performance factors in choosing the lawyers of the future. Individual law schools could use varying strategies in combining academic-based and professional-based predictors, and could also select particular professional effectiveness factors in light of the particular mission of their own school. We believe the result of this research would be to select better lawyers in a more principled way than is available to law schools today.



Photos from the SALT Board's weekend in Minneapolis. Top left: Jean Love and Pat Cain; Bottom left: Kris Glen; Bottom right: Holly Maguigan, Norman Dorsen, and Sylvia Law.



Book Review: Bill Quigley's *Ending Poverty*

SALT Co-President Michael Rooke-Ley, Seattle University School of Law (visiting 2003-04)

Bill Quigley, this year's recipient of the SALT Teaching Award and a professor of law at Loyola-New Orleans, has written an inspiring book entitled *Ending Poverty as We Know It: Guaranteeing a Right to a Job at a Living Wage*.

For many Americans, these first few years of the 21st century have fast become "the worst of times." Our nation faces unprecedented hostility abroad, civil liberties at home are slipping away, nominees to the federal bench are a frightening array of extremists, education and social programs are facing drastic cuts at every turn, our economy is in the tank, jobs are being lost at an alarming rate . . . and the working poor are more impoverished than ever.

Yet, somehow, in the face of all these horrible conditions, Bill finds a way to give us hope and to get us to work even harder to create a just and decent society. He proposes a constitutional amendment guaranteeing a job and a living wage to each person who is willing to work. While readily acknowledging that this proposal will face huge political hurdles (and will not eliminate poverty entirely), he reminds us that skeptics quickly dismissed as

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economically impractical such “pie-in-the-sky” ideas as Social Security, Medicare, minimum wage, unemployment insurance and protections for the disabled. Drawing on the likes of Thomas Jefferson, Thomas Paine, Franklin Delano Roosevelt, Martin Luther King, Jr., various religious leaders and, most recently, Barbara Ehrenreich (“Nickel and Dimed in America”), Bill gives us the strength to carry on.

His book, just 150 pages and aimed at a general audience, is easily digestible. Of particular importance to those of us who might find ourselves sitting around a politically-divided holiday dinner table is his second chapter, in which he dispels common myths about poverty and work. With facts, figures and heartbreaking anecdotes, he responds to those who would say that “Most poor people don’t work”; “There are plenty of jobs out there for those who want to work — just look at the want ads!”; “If people would just work, even at minimum wage they wouldn’t be poor”; “Most poor people are African-American and Hispanic”; “Most of the poor are non-working, middle-aged, panhandling bums”; and “The United States provides more help to poor people than any other country in the world.”

I highly recommend this book to you, but if you’re still unsure, check out www.endingpoverty.com, where you can read the first chapter for free! And I invite you to join us in honoring Bill at SALT’s Annual Awards Dinner on Monday, January 5th, in Atlanta.

Arthur Kinoy Tribute

SALT Co-President Paula C. Johnson, Syracuse University College of Law

“The test for a people’s lawyer is not always the technical winning or losing of the formal proceedings. The real test is the impact of the legal activities on the morale and understanding of the people involved in the struggle. No matter how experienced, clever, and resourceful a lawyer may be, the most important element is still the informed support and active participation of the people involved. Without this, a legal victory has very little meaning indeed.” — Arthur Kinoy

With great sadness, we noted the passing of Arthur Kinoy on September 19, 2003, at age 82. Arthur was an extraordinary advocate and law teacher, who inspired many generations of law students, lawyers, and law professors who followed his example and devotion to civil rights and civil liberties. In standing up for the constitutional rights of all persons, Arthur was at the forefront of many landmark cases during the 20th century. Among the legions of his celebrated clients and causes were Julius and Ethel Rosenberg, Cong. Adam Clayton Powell, Jr., the “Chicago Eight,” and numerous civil rights activists.

In addition to Julius and Ethel Rosenberg, Arthur Kinoy represented many victims of the McCarthy era during the 1950s and 1960s. In the 1960s, he focused on civil rights in the South, and represented Fannie Lou Hamer and the Mississippi Freedom Democratic Party, the Student Coordinating Committee (SNCC), and the Southern Christian Leadership Conference (SCLC). He argued *Dombrowski v. Pfister* in 1965, resulting in a landmark Supreme Court decision that extended First Amendment protections to civil rights workers. In 1969, with William Kunstler and Leonard Weinglass, Arthur represented the Chicago Eight anti-war activists, who were accused of inciting a riot at the 1968 Democratic Convention. All of their convictions were overturned on appeal. In 1972, he successfully argued *United States v. District Court*, in which the Supreme Court rejected the Nixon Administration’s claims to “inherent power” to wiretap domestic political organizations.

Arthur Kinoy joined the faculty at Rutgers University School of Law-Newark in 1964, and helped establish the Center for Constitutional Rights in 1966. His legendary oral arguments in *U.S. v. U.S. District Court* and *Powell v. McCormack* can be heard in their entirety at www.oyez.org. His 1983 autobiography was aptly titled, “Rights on Trial: The Odyssey of a People’s Lawyer.” His landmark constitutional rights advocacy, the institutions he helped to form, the Kinoy-Stavis Public Interest Fellowship at Rutgers Law School, and the numerous loved ones, colleagues, students and admirers whom he leaves behind all ensure that Arthur Kinoy’s legacy will live on.



House Un-American Activities Committee (HUAC) chair Joseph Poole ordered U.S. marshals to drag Arthur Kinoy from the hearing room while he was representing anti-war demonstrators in 1966. William Kunstler stated this photo, which appeared on the front page of newspapers across the nation, was the beginning of the end of HUAC’s notorious existence.

Judicial Nominations Battles Continue

Bob Dinerstein, American University,
Washington College of Law

Judicial nominations continue to roil the capital, with less intensity than Hurricane Isabel (this fall's entry in what seems like our annual plague) but with the capacity for creating even more long-term mischief.

Since my last report, the Bush Administration, on September 4, 2003, withdrew the nomination of Miguel Estrada for a position on the United States Court of Appeals for the District of Columbia. While the New York Times was supportive of the withdrawal (Editorial, "Miguel Estrada Bows Out," September 5,

"Even as progressive forces have achieved some victories ... the nominees who have been confirmed represent an increasing 'conservatization' of an already conservative judiciary."

2003), and called for "Straight Talk on Judicial Nominees" (Editorial, September 10, 2003, chastising Republican reaction to the withdrawal), the Washington Post editorialized that the withdrawal, far from the "victory for the Constitution" that Senator Kennedy labeled it, was a "victory for a smear." (Editorial, September 5, 2003.) So much for the supposed lockstep liberal bias of the media.

On October 2, 2003, the Senate Judiciary Committee, on a party-line vote, voted to approve the re-nomination of

Judge Charles Pickering, Sr., for a position on the U.S. Court of Appeals for the Fifth Circuit. SALT members will recall that Pickering was rejected by the Senate Judiciary Committee in March 2002, only to be re-nominated by the White House (after the Republicans regained control of the Senate) in January 2003. Some observers thought that, after the Trent Lott/Strom Thurmond birthday party fiasco, the Administration would not re-nominate someone closely tied to Senator Lott and with his own record of racial insensitivity and bias. But the Bush Administration was undeterred, and the nomination now awaits action on the Senate floor. As of this writing, no floor vote has been scheduled, but there is a reasonably good chance that if the nomination comes to a vote the Democrats will attempt to filibuster it.

For those keeping score on the filibusters, the Democrats are currently filibustering two nominations: those of William Pryor (failed cloture vote, July 31, 2003) and Priscilla Owen (failed cloture votes, May 1, May 8, and July 28, 2003). Like Judge Pickering, Justice Owen was rejected by the Judiciary Committee in the last Congress but was re-nominated in this session. Prior to its withdrawal, the Estrada nomination yielded seven failed cloture votes. There are several nominees in various stages of the confirmation process — Carolyn Kuhl (Ninth Circuit; voted out of committee, May 8, 2003; no floor vote yet scheduled), Charles Pickering, Claude Allen (Fourth Circuit; no hearing scheduled), and Janice Rogers Brown (D.C. Circuit; hearing scheduled October 22, 2003) — who the Democrats may well filibuster if the nominations come to the floor. But it is not realistic to think that the Democrats can or will filibuster every problematic nominee. So even as progressive forces have achieved some victories — or at least forestalled some defeats — the nominees who have been confirmed represent an increasing

"conservatization" of an already conservative judiciary.

While the Republicans are complaining about the use of the filibuster to block the Administration's judicial nominations, their efforts to date to limit the use of the filibuster have not been successful. Of course, it is more than a little ironic that the filibuster — that hoary relic of infamous efforts to beat back civil rights legislation in the 1950s and 1960s — should now be used in service of those lawmakers seeking to prevent the confirmation of retrogressive judges. Truly, yesterday's reviled tactic becomes today's weapon of choice in the ever-changing political landscape.

SALT has been active in monitoring the above developments and in weighing in, both officially and unofficially, on a number of them. At its October 2003 board meeting, the SALT Board approved sending a revised letter in opposition to the re-nomination of Judge Charles Pickering, Sr., described above. In 2002, SALT wrote a letter to the Senate Judiciary Committee in opposition to Judge Pickering, and we updated the letter to take account of more recent developments. Our letter is reproduced below. In addition, we are exploring the possibility of recommending letters in opposition to Michael Fisher (Third Circuit), Janice Rogers Brown (D.C. Circuit), and Claude Allen (Fourth Circuit), when and if circumstances permit.

And now a plea from the committee (or at least from the chair!): Following these judicial nominees, researching their records, and writing letters about them takes a great deal of time that none of us has enough of. If the state of the judiciary matters to you, we hope you'll get involved and assist the committee in its work. If interested, please contact Robert Dinerstein at rdiners@wcl.american.edu or by phone at 202-274-4141.

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A Conversation with Chief Justice John Marshall about Preemptive War*

John B. Mitchell, Seattle University School of Law

Interviewer [hereinafter "I"]: Thank you for agreeing to talk with us, Mr. Marshall.

John Marshall [hereinafter "J"]: My pleasure.

I: Let me get right to the point. You've been quoted as saying that the Founders neither envisioned nor intended to give the federal government the power to wage preemptive war.

J: That's correct.

I: And that applies even if Congress formally declares the war and the President concurs?

J: Even if the President is leading the troops into battle on his horse with his sword drawn. No preemptive war.

I: So are you saying that the Founders believed that they should wait until they were actually attacked before they could use military force?

J: No . . .

I: You know, by then it could be too late.

J: I understand. We'd have used force if an attack was *imminent*, like your classic self-defense.

I: But you had an ocean between yourselves and the wooden navies of Europe, which were your only real threats. You never conceived of an object that could be launched across the ocean and land with such explosive force that the object could obliterate any city existing in your world. Nor could you have imagined structures the size of a hundred houses stacked on top of one another, and a flying object crashing into the structure, exploding and destroying the entire edifice.

J: Thank God, we did not. I think we had slightly more elevated hopes for the

products of human ingenuity. But in any event, that doesn't alter the basic position; it merely provides the factual context for what will constitute imminence in what you choose to call the modern world.

I: Fine. Maybe then you can give us a few examples of what you would consider imminent from our perspective in year 2003.

J: Certainly — attacking the Japanese fleet steaming toward Pearl Harbor in WWII provided you had clear and convincing evidence of their intent, bombing a terrorist training camp planning attacks on our citizens or soil, going on the offensive after suffering an initial attack and knowing that further attacks are

*"We're talking about
the limits of the
federal power itself...
and holding the
federal government to
those limits."*

coming, attacking when you know that any enemy is preparing to launch missiles . . .

I: I think I get it. But to be clear, why don't you tell me what you mean by "preemptive war?"

J: Simple: Use of military force when you are neither being attacked, nor is such an attack imminent.

I: Okay, so would you characterize the recent Iraqi war as preemptive?

J: I'd put it in the dictionary as the definition of such a war. That's even what the administration said it was. As early as May 2002, President Bush came right out and spoke about the use of preemption in a speech he gave at West Point on combating terrorism. Afterwards, the administration continued to maintain that Saddam

Hussein must be eliminated because his regime was continuing development of weapons of mass destruction, and *might* use those weapons against an opponent, or *might* supply those weapons to terrorist networks.

I: This is all very interesting, but my readers are legal scholars. And the first thing they will think when they hear all you've said is that none of this is a matter for the courts. Because — and correct me if I'm mistaken — our courts have consistently avoided deciding anything about the War Power and the War Power Resolution, relying instead on the Political Question Doctrine.

J: You're correct, but what I am talking about is completely different.

I: How?

J: All those cases to which you're referring involved the proper allocation of war-making power between the President and Congress. For a number of reasons, the courts have felt it inappropriate to enter an arena that they view as essentially given to the political process under our Constitution. But here, we're talking about the limits of the federal power itself — that is, the limits of the war power given the President and Congress, even if combined — and holding the federal government to those limits. That is a classic role for a court.

I: Okay. But it's not necessarily so simple. Iraq was plainly preemptive. But imagine we are again on the brink of war. The government claims the threat is imminent, while other groups disagree. Isn't whether or not a threat is "imminent" a classic political question, appropriately left to the expertise of the Executive Branch?

J: Yes, if that's what the judge was deciding. But I'd limit review to whether or not a reasonable person *could* find the threat imminent. Again, this is a pure legal issue, analogous to determination of conditional relevance under your Federal Evidence Rule 104(b).

I: Okay, you were the first Chief Justice, so I guess you know your law. So let's get back to the main point. You say the Founders never envisioned or intended giving the power to wage preemptory war to the federal government.

J: Back to square one, and you're correct.

I: But there's nothing, as far as I could find, in the Constitution, commentaries, or cases about preemptive war — not a single word, ever — so am I missing something?

J: No, you're right. There's nothing written in the Constitution or anywhere else because, until Iraq, it was unimaginable that America would attack and then occupy a sovereign nation which neither attacked nor was about to attack this nation. Between giving the President the powers of Commander-in-Chief, foreign affairs, and insuring the faithful execution of the laws, and giving Congress the powers to raise armies, tax, declare war, and enter into treaties, all enhanced by the "Necessary and Proper" clause, we gave the

J: First, and I don't mean to be unnecessarily disrespectful to the current government, but the truth is that, as a group, we were a great deal smarter than your current leaders, and we wouldn't have condoned any allocation of power that would allow anything that was as obviously dangerous and unwise as preemptory war or preemptory self-defense.

I: Unwise?

J: Absolutely. Look at the desire of every sane 21st century American to live in a safe global community. We didn't have to worry about that quite as much in my day, with our transportation and communication limiting the creation of a global community, but it still was not our desire to live in an unstable world in which our commerce could be disturbed by some European war with its wartime embargo, potential seizure of our ships, and such. But in your world, giving any legitimation to the concept of preemptive war is absurd to the point of suicidal. If America-Iraq has legitimacy, a fortiori you have established the legitimacy of India-Pakistan, China-India, and North Korea-South Korea to commence lobbing artillery shells and nuclear bombs at each other.

I: I see. . . .

J: In fact, America's daily experience as a result of the Iraqi war should tell you how very dangerous and unwise the concept of preemptory war is. First, because preemptory war does not require the other nation to actually attack or be in the process of carrying out an imminent attack, it's all too easy for an administration to create the "threat" that is then used as the basis for the preemptive war. Weapons of mass destruction, claims in a State of the Union address about enriched uranium purchases from Africa, supposed ties between Saddam Hussein and 9/11 all turned out to be fairy tales worthy of Hans Christian Andersen. Second, even if you triumph in a preemptive war, things are far from easy. Because the defeated nation

never really did anything to you, it's a bit difficult to have any legitimacy in the eyes of those you're occupying. You are an aggressor nation, an occupier, and the likelihood of a patriotically-inspired resistance movement against your occupying forces is, therefore, substantial.

I: Okay, preemptive war may be a bad idea, and I'll admit you Founders were really smart, but the fact that it may have been a bad idea does not necessarily mean that you would not have included it within the constitutional powers of the federal government. After all, you permitted the slave trade to continue, and that was a monumentally bad idea. . . .

J: Fair enough. But I have other reasons to maintain that preemptory war is beyond the power of the federal government.

I: Fine. Go ahead.

J: To start with, look at our situation at the time we drafted the Constitution. We had fought a war, and buried a number of good friends. We were all very clear that we wanted to avoid getting into another war. As James Wilson said in the Pennsylvania ratifying convention, "The system will not hurry us into war; it is calculated against it." We simply could not afford the cost of war and still build our country — something you now face every day as a result of the war against Iraq. Wars for us were matters of necessity, to be avoided if possible. Preemptive war, on the other hand, permits war without such necessity. That, then, is the last thing we would have wished. Also, the greatest fear regarding war powers among the significant number of citizens who comprised the Anti-Federalists was that the President, in alliance with or at least unopposed by Congress, would use a standing army to create a federal dictatorship. Allowing preemptive war would have given the executive a ready rationale for maintaining just such a standing army.

I: I hadn't thought about that. I guess

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*"...we did not give
that federal
government the power
to wage war as an
aggressor."*

Federal government all the power it would ever need to protect this nation, its citizens and property, both at home and abroad. But we did not give that federal government the power to wage war as an aggressor.

I: But if you did not even imagine the use of preemptory war or preemptory self-defense, what is your basis for now saying that you did not intend to give that power to the federal government?

Marshall:

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that's why you're the first Chief Justice, and I'm just a journalist. Is there more you would like to add?

J: Certainly. Preemptive war was also antithetical to our philosophical and religious beliefs.

I: Such as?

J: Philosophically, we structured our Constitution and form of government on the Social Contract theory of the 16th Century English philosopher John Locke. Others had debated the theory, but we were the first to put it into practice. You may know the theory — you leave the “state of nature” in which it is all against all, in which each is his or her own law, and, in return for the protection of your life and property, enter into a social compact in which the law is carried out by a representative government, itself bound by law. This “contract” theory underlies the entire legitimacy of our government. Certainly a government created under a theory in which citizens enter a contract to protect themselves from the ultimate risk in the state of nature — that someone to whom they had threatened no direct harm would nevertheless take their life or property — would be loathe to arrogate to itself the right to do that very thing to nations and individuals beyond our borders: i.e., attack when not directly threatened.

I: You also mentioned religious beliefs. Tell me about those . . .

J: We were intensely religious, and, in fact, our religious perspective was inextricably intertwined with our political philosophy. Thus, the concept that, under the Social Contract theory, the individual never cedes his “natural rights” to the community is underlain by the belief that men have been endowed by God with natural rights, rights revealed through their God-given power of reason. As you can imagine, the Catholic “Just War” doctrine

had currency with us. Under this doctrine, war is only legitimate as a last resort in the face of a real and certain danger to the nation. Attacking someone who has neither attacked nor is about to attack you — in other words, preemptive war — is an obvious violation of this doctrine. Not

“Certainly a government created under a theory in which citizens enter a contract to protect themselves from the ultimate risk in the state of nature ... would be loathe to arrogate to itself the right to do that very thing to nations and individuals beyond our borders...”

surprisingly, on November 13, 2002, the United Conference of Catholic Bishops announced that the then-proposed war on Iraq would not constitute a “just war.”

I: Is there anything else?

J: How about the fact that, in our 214-year history as a nation, with well over 100 instances in which we have employed military force, we have *never once* — until Iraq — engaged in a preemptive war.

I: What have all these other wars and instances of using military force been about?

J: There have been a range of rationales — protecting U.S. citizens and property, particularly when local governments could no longer maintain order; implementing the Monroe Doctrine, supplemented by treaties; restoring governments to power; responding to a foreign state that supported terrorism that resulted in the death

of American citizens in Europe; freeing Americans held hostage abroad; ensuring the neutrality of the Panama Canal; preserving the status quo while negotiating the annexation of foreign-held territory on our continent; pursuing pirates, bandits, and outlaws; protecting military personnel; protecting our shipping; responding to attacks on our soil; and acting pursuant to some regional and bilateral defense pact, treaty obligations, and U.N. membership. Admittedly, in retrospect, some of these rationales might appear disingenuous, masking blatant land grabs from our neighbors, such as the annexation of the Texas territory as a result of the Mexican War. Nonetheless, even our most dubious resorts to military force never even hinted at preemptive war as a rationale.

I: Let's talk about the Cuban Missile Crisis. Weren't we ready to attack under a preemptory self-defense rationale?

J: Perhaps, but I would characterize that situation as falling far closer to the category of imminence. Our deadly enemy, who had stated that “we will bury you,” had surreptitiously placed nuclear missiles a boat ride from our shores, and now had advisors manning those missiles. It would be difficult to imagine a scenario further from the reality of Iraq. In any event, we did not attack Cuba.

I: Well, I think that pretty much covers it. Thank you, Mr. Chief Justice.

J: You're very welcome.

(Footnotes)

* An expanded and fully documented version of the ideas in this imaginary dialogue will appear in traditional law review form in *Preemptive War: Is It Constitutional?*, 44 Santa Clara L. Rev. ____ (2004). The article will also include an extensive discussion regarding the justiciability of this issue and why the Political Question Doctrine does not bar judicial review, as well as why governmental claims of military/national security privilege will not bar an appropriate factual inquiry by the court.

Nominations:

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SALT Letter in Opposition to Charles Pickering, Sr.:

Re: STATEMENT OF SOCIETY OF AMERICAN LAW TEACHERS REGARDING THE NOMINATION OF JUDGE CHARLES PICKERING TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Dear Senators Frist and Daschle:

On behalf of the Board of Governors of the Society of American Law Teachers (SALT) — the largest membership organization of law professors in the nation — we write to express our grave concerns regarding the nomination of Charles Pickering to the United States Court of Appeals for the Fifth Circuit. On February 7, 2002, we wrote to the then-chairman of the Senate Judiciary Committee, Senator Patrick J. Leahy, expressing our opposition to Judge Pickering's nomination. Unfortunately, our concerns have not abated with the passage of time, and we continue to oppose this nomination.

Since its founding thirty years ago, SALT has sought to make the legal profession more inclusive and responsive to under-served individuals and communities. These goals have particular meaning in the states of Texas, Louisiana and Mississippi, which comprise the Fifth Circuit. The Fifth Circuit also is home to the largest percentage of racial and ethnic minorities in any of the eleven circuits.¹ For residents of these states who must turn to the courts to vindicate their rights, the Fifth Circuit is, as a practical matter, the court of last resort. In light of these concerns and after careful review of Judge Pickering's record, SALT urges the Senate to reject his nomination to the United States Court of Appeals for the Fifth Circuit.

The available public record raises troubling questions about Judge Pickering's ability to enforce federal law

guaranteeing civil rights, as discussed below.

• In his opinion in *Fairley v. Forrest County, Miss.*, 814 F.Supp. 1327 (S.D. Miss. 1993), rejecting a challenge to a county supervisory districting plan under the "one-person, one-vote" principle of the Fourteenth Amendment, Judge Pickering repeatedly described the courts' role in such cases as "obtrusive."² Much of Judge Pickering's opinion was devoted to

"If Judge Pickering believes the asserted right is of little value, and the cost of protecting such rights is too burdensome, the right should not be protected."

explaining his conclusion that — contrary to the United States Supreme Court's precedents — a total deviation of 16.4% among election districts "is really de minimis variation in actual voter influence."³ He then complained of the costs of enforcing this constitutional right:

[I]t is submitted that no one can know or assimilate information as to the tremendous amount of taxpayer money that has been spent on apportioning and reapportioning political bodies to comply with court rulings or to comply with what lawmakers perceive to be judicial requirements. No one can calculate the number of hours devoted by public officials to resolving reapportionment issues, trying to live by court mandates. Oftentimes, other government problems are ignored because legislative bodies are trying to solve reapportionment according to what they think the courts will require . . . It is

submitted that most voters care less about such mathematical precision when it changes their actual influence so little, than they desire to save tax dollars, avoid disruption and the breaking of so many political subdivision lines.⁴

Judge Pickering has made clear his preferred methodology for deciding civil rights and constitutional claims: if Judge Pickering believes the asserted right is of little value, and the cost of protecting such rights is too burdensome, the right should not be protected.

Judge Pickering said nothing at his February 7, 2002 confirmation hearing to suggest that he now appreciated the importance of voting rights or the barriers African Americans faced in trying to vote in Mississippi in the 1960s. He ascribed the low number of African American voters in this era to their failure to vote without recognizing the extraordinary tactics of obstruction, harassment and intimidation to which they were subjected.

• Judge Pickering's opposition to enforcement of the Voting Rights Act also was evinced earlier during his term as a Mississippi state senator. In 1975, he co-sponsored a Mississippi Senate resolution calling on Congress to repeal the Voting Rights Act or apply it to all states, regardless of whether a state shared Mississippi's extensive history of blatant violations of voting rights of African Americans.⁵

• Judge Pickering's comments when denying the appeal of death row prisoner Howard Monteville Neal also raise questions about his willingness to consider carefully the claims of those before his court. Mr. Neal, a defendant with mental retardation with an IQ of between 54 and 60,⁶ was sentenced to death for the rape and murder of his thirteen-year-old niece in 1982.⁷ The defendant alleged that his lawyer provided ineffective assistance by failing to adduce mitigating evidence at

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Nominations:

▼ *continued from page 17*

the sentencing phase of his trial. After the Mississippi Supreme Court rejected his claim, Judge Pickering denied Neal's petition for writ of habeas corpus, stating that ordering a review after nearly 18 years "undermines the finality, certainty and integrity of the judicial process. . . ."⁸

Mr. Neal appealed the denial of his habeas corpus petition to the U.S. Court of Appeals for the Fifth Circuit. A panel of that Court, and then the Court sitting en banc, ultimately affirmed Judge Pickering's ruling.⁹ But the Fifth Circuit's thoughtful and careful review (in a 14-page opinion) was in marked contrast to the short shrift that Judge Pickering gave to the case. The Fifth Circuit found that the additional evidence presented in the petition "does, indeed, make disturbing reading."¹⁰ The appellate court found that Mr. Neal's "trial counsel was deficient in failing to investigate, gather, and consider [available evidence] for purposes of presentation at Neal's sentencing hearing,"¹¹ and that "there is a reasonable probability that a jury would not have been able to agree unanimously to impose the death penalty if the additional evidence had been effectively presented and explained to the sentencing jury."¹² The Fifth Circuit noted that additional evidence presented by Mr. Neal's appellate counsel "augment[ed] Neal's mitigating circumstances argument in at least five ways," including details of his childhood ("including the terrible living conditions with the alcoholic and abusive father") and "the bleak, depressing, and hopeless life at the mental institutions" and "abuse and mistreatment in prison" where he had been confined.¹³

Judge Pickering, on the other hand, had not found it necessary to examine Mr. Neal's petition in such detail. For Judge Pickering, finality is more important than

the rights of a man with mental retardation who, the Fifth Circuit found, was not provided the fundamental constitutional right of effective assistance of counsel. Given the widespread use of the death

"[Judge Pickering] suggested a statutory amendment that would allow the Mississippi state courts to enforce the state's prohibition on interracial marriages."

penalty in the three states comprising the Fifth Circuit, that court demands judges who are sensitive to the legal claims raised by death row inmates and who will impose this ultimate sanction only after rigorous assurance that all fundamental rights have been provided to the accused. We believe that Judge Pickering is not such a judge.

• Judge Pickering's opposition to enforcement of basic civil rights was demonstrated early in his legal career, extending back to his work as a law student at the University of Mississippi Law School. Judge Pickering published a casenote on the Mississippi Supreme Court's decision in *Ratliff v. State*, 107 So.2d 738 (Miss. 1958), which reversed a criminal conviction for a violation of Mississippi's miscegenation statute. Judge Pickering's analysis conceded the correctness of the decision, but suggested an alternative interpretation that would have upheld the conviction. In addition, he then suggested a statutory amendment that would allow the Mississippi state courts to enforce the state's prohibition on interracial marriages. The Mississippi state legislature enacted the amendment

the following year.¹⁴

While this episode might be dismissed as a distant reflection of mainstream views in Mississippi in 1959, Mississippi law students of that period were hardly universal in their acceptance of racial segregation.¹⁵ Moreover, while Judge Pickering asserted at his 2001 confirmation hearing that "who one marries is a personal choice and that there should not be legislation on that,"¹⁶ this indirect repudiation occurred on the eve of his confirmation hearing. This belated response only reinforces the conclusion that his unwillingness as a judge to enforce civil rights statutes is deeply rooted.

• Judge Pickering's highly unusual intervention on behalf of a defendant convicted of cross-burning, well-documented elsewhere, further reflects his insensitivity on issues of racial justice and raises ethical questions about his judicial conduct.

• Finally, Judge Pickering has failed to

"Throughout his legal career, Judge Pickering has demonstrated a marked insensitivity regarding the need to protect those individuals in our society most in need of the federal courts' protection."

meet the burden of demonstrating the candor required of all judges. At his 1990 confirmation hearing before the Senate Judiciary Committee (where he was being considered for appointment to the federal district court), Judge Pickering testified that he "never had any contact" with the Mississippi Sovereignty Commission, a state-funded agency created to resist

desegregation and used to spy on civil rights and labor organizations in Mississippi. However, the subsequent release of the Sovereignty Commission's records indicates that Judge Pickering did have contact with the Commission: he wrote a letter in 1972 to a Commission investigator asking to be "advised" about a group trying to organize pulpwood workers.¹⁷ At his hearing in 2002, Judge Pickering acknowledged that at the 1990 hearing he had misrepresented facts regarding his contacts with the Commission.

Throughout his legal career, Judge Pickering has demonstrated a marked insensitivity regarding the need to protect those individuals in our society most in need of the federal courts' protection. Such protection is especially critical in the Fifth Circuit. The Senate Judiciary Committee was right to reject Judge Pickering's nomination in 2002, and SALT strongly urges the entire Senate to reject Judge Pickering's nomination now.

Sincerely,

Paula C. Johnson, Professor of Law,
Syracuse University School of Law

Michael Rooke-Ley, Professor of Law
(Visiting), Seattle University School of Law
Co-Presidents, SALT

(Footnotes)

¹ U.S. Census Bureau, Table 1, Population by Race and Hispanic or Latino Origin, for the United States, Regions, Divisions, and States, and for Puerto Rico: 2000, available at <<http://www.census.gov/population/cen2000/phc-t1/tab01.pdf>>

² 814 F. Supp. at 1330 ("obtrusive"); *id.* at 1336 ("obtrusion"); and *id.* at 1344 ("obtrusive").

³ *Id.* at 1331.

⁴ *Id.* at 1337-38.

⁵ *Journal of the Senate of the State of Mississippi* (1975) at 124 (S.C.R. 549).

⁶ *Neal v. Puckett*, 239 F.3d 683, 685, 696 (5th Cir. 2001).

⁷ The *Neal* case preceded the Supreme Court case of *Atkins v. Virginia*, 536 U.S.

304 (2002), which held that execution of defendants with mental retardation violated the Eighth Amendment's proscription against cruel and unusual punishment.

⁸ *Judge rejects appeal of death row inmate convicted of killing family*, Associated Press Newswires (Jan. 12, 1999).

⁹ *Neal v. Puckett*, *supra* note 6; 286 F.3d 230 (5th Cir. 2002) (en banc), *cert. denied sub nom. Neal v. Epps*, 537 U.S. 1104 (2003).

¹⁰ *Neal*, 286 F.3d at 238.

¹¹ *Id.* at 240.

¹² *Id.* at 244. Ultimately, however, the Fifth Circuit declined to order relief for Mr. Neal because it did not find the Mississippi Supreme Court's judgment involved an "unreasonable application" of the *Strickland v. Washington* standard for ineffective assistance of counsel, as required by the Antiterrorism and Effective Death Penalty Act.

¹³ *Id.* at 244.

¹⁴ Laws of the State of Mississippi (1960), at 356-57, listing Mississippi S.B. No. 1509 (approved Feb. 24, 1960), amending Section 2000, Mississippi Code of 1942.

¹⁵ See, e.g., Alfred E. Moreton, *Constitutional Law - Power of State Legislature to Exclude Negroes from Municipal Corporations*, 31 Miss. L. J. 176, 177 (1960) (describing the Fifth Circuit's decision in *Gomillion v. Lightfoot*, 270 F.2d 594 (5th Cir. 1959), and noting, "There appears to be great force in the argument of Judge Wisdom that the color of the parties is no valid distinction . . .").

¹⁶ Transcript of Nominations Hearings, Senate Committee on the Judiciary, Oct. 18, 2001, at 64.

¹⁷ Ana Radelat, *Pickering lied about contacts to anti-segregation commission, groups say*, Gannett News Service (Jan. 25, 2002), available at 2002 WL 5255700.

Awards Dinner:

▼ continued from page 1

Congressman John Lewis, a legendary figure in the U.S. Civil Rights Movement, will receive the 2004 SALT Human Rights Award. The SALT Human Rights Award recognizes the extraordinary work of an individual or organization in advancing the principles of equality and equal access to legal education, the legal profession and legal services. Congressman Lewis organized and participated in sit-in demonstrations in Nashville, was a volunteer in the Freedom Riders and from 1963 to 1966 served as the Chairman of the Student Nonviolent Coordinating Committee (SNCC). He has served as Congressman for Georgia's fifth Congressional District since 1986.

The SALT Teaching and Human Rights Awards will be presented at SALT's annual dinner, on Monday, January 5th, 2004. The dinner will be held in Atlanta's 103 West Restaurant, located at 103 West Paces Ferry Road. The pre-dinner reception will begin at 6:30, dinner at 7:30. *Please join us for a magnificent evening in which SALT celebrates the lives and works of these two extraordinarily gifted and giving persons.*

In addition we invite you or your institution to offer your congratulations and support to the honorees in the SALT dinner program by purchasing a program ad. You can provide camera-ready copy or simply send the requested text and we will design an ad for you. A full page ad (5 1/2" x 8 1/2") costs \$200, a half page ad (5 1/2" x 4 1/4") is \$100. Please fax or e-mail your ad requests to Prof. Margalynne Armstrong by Dec. 5, 2003. E-mail: Margalynne@aol.com, fax (408) 554-4426.

For further information about the dinner please contact Prof. Armstrong at (408) 554-4778 or Prof. Robert Dinerstein at (202) 274-4141. For more information regarding program ads please contact Prof. Armstrong.

Solomon:

▼ *continued from page 1*

Greenfield has noted, "If prospective employers are looking for the best and brightest, we are delighted to help. But if an employer is looking only for white students, or Catholic students, or straight students, we will not assist them in recruiting." Law schools have made no exception for any employer, thus applying the policy evenhandedly to the military, which explicitly discriminates on the basis of sexual orientation.

For years, the military did not complain. The government was easily able to recruit military lawyers without the aid of law schools. But things changed about eighteen months ago when the government decided to turn up the heat and aggressively apply the previously dormant Solomon Amendment. Now the military has taken the position that the Solomon Amendment requires schools to give military recruiters the benefit of every service and facility which is made

"By the summer of 2003, every law school whose institution receives federal funds had given in to the military's demands and suspended their nondiscrimination policies as applied to their recruiters."

available to non-discriminating employers. Should a law school violate this policy, the military has threatened to cut off all funds to the entire university, covering everything from clinical studies and

weapons research to humanities grants.

As SALT members know all too well, law schools could not resist such threats for long. By the summer of 2003, every law school whose institution receives federal

"By extorting compliance with threats of funding loss to all university departments ... the government is imposing an unconstitutional condition."

funds had given in to the military's demands and suspended their non-discrimination policies as applied to their recruiters. By September, military recruiters started arriving on campuses for the fall recruiting season, demanding to co-opt the resources of our career services offices. In response, SALT and FAIR and others have said "enough" — enough of the heavy-handedness, of having to compromise, of settling for "ameliorative" efforts.

The suit, captioned Forum for Academic and Institutional Rights, Inc. & Society of American Law Teachers et al. v. Rumsfeld et al., alleges that the Solomon Amendment is a blatant violation of the First Amendment rights of academic institutions and faculties to decide what lessons to teach their students and how to teach those lessons. It points out that the Solomon Amendment's sponsors never hid their censorial purpose, to "send a message over the walls of the ivory tower" and to make law schools understand that there would be a "price to pay" for their "starry-eyed optimism." By extorting compliance with threats of funding loss to all

university departments — affecting programs which are wholly unrelated to the law school's career services office — the government is imposing an unconstitutional condition.

Representing SALT and FAIR on a pro bono basis is the law firm of Heller Ehrman White & McAuliffe, whose legal team, led by Josh Rosenkranz (formerly of NYU's Brennan Center), has provided us with an extraordinary level of talent, resources and commitment. Having law professors for clients is no picnic, yet our lawyer/client relationship has been exemplary. Quite simply, we could not ask for more.

As the first plaintiff to step forward in this lawsuit, SALT has been gratified by those law schools and law students who have since joined as plaintiffs. With respect to law schools, FAIR was conceived as a necessary umbrella for those law schools wishing to challenge the Solomon Amendment, but which were reluctant to reveal their identities lest they be subject to political retaliation from the Department of Defense, individual members of Congress or other constituencies. FAIR's institutional membership (which remains confidential) continues to grow, thanks to the efforts of so many SALT members nationwide, and, as of this writing, at least three schools have publicly announced their decision to join FAIR: Golden Gate University School of Law, Whittier Law School, and Chicago-Kent College of Law. Our hats are off to them! In addition, separate lawsuits challenging the Solomon Amendment have been filed by law professors at the University of Pennsylvania and at Yale University. We congratulate them, as well. On the other hand, we are disappointed to report that the AALS chose not to get involved.

We will keep you posted as events unfold; you can also find the briefs and a host of information at www.solomonresponse.org.

SALT at AALS

Calendar of Events

Saturday, January 3, 2004

SALT New Teachers Reception

6:30–8:00 p.m.

SALT Hospitality Suite, Marriott
Atlanta Marquis

SALT Cover Workshop

“Voting and Democracy: New Movements and Legal Issues,” an examination of democracy voting and the political crisis we have been in at least since *Bush v. Gore*, with an emphasis on the movements that are emerging around different aspects of the theme

8:00–10:00 p.m.

Amsterdam, Copenhagen/Stockholm,
Convention Level, Marriott Atlanta
Marquis

Monday, January 5, 2004

SALT Annual Awards Dinner

6:30 p.m. Cocktail Reception;

7:30 p.m. Dinner

103 West Restaurant, 103 West Paces
Ferry Road, Atlanta, Georgia

Tuesday, January 6, 2004

SALT Board of Governors Meeting

11:00 a.m.–2:00 p.m.

Copenhagen, Convention Level,
Marriott Atlanta Marquis

Cover, Grillo, and Amaker Retreats

Cover Retreat

“Staying Sane as Public Interest Law Students and Practitioners”

February 27 to February 29, 2004

Sargent Center, Hancock, New Hampshire

For more information, contact:
Nik Kolodny, nk416@nyu.edu or Skykla
Olds, svo200@nyu.edu

Grillo Retreat

“Empowerment for Social Change”

March 13 to March 14, 2004

Park Plaza Hotel, San Jose, California

Ralph Abascal Memorial Lecture by U.S.
Senator Barbara Boxer

For more information, check the Web site:
www.scu.edu/law/socialjustice

Amaker Retreat

“Access to Justice”

March 26 to March 28, 2004

Bradford Woods Conference Center,
Martinsville, Indiana

For more information, contact: Kyleen
Nash, snash@iupui.edu

Norman Dorsen Fellowship

PLEDGE FORM

Yes! I want to support the Norman Dorsen Fellowship. Over the next five years I promise to make the tax deductible contributions at the following level:

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Make your check payable to: SALT, designated to the Dorsen Fund on the notation line, and mail to: Sylvia A. Law, NYU Law School, 40 Washington Sq. So., New York, N.Y. 10012.

The contribution is tax deductible.

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- ☐ Enroll/renew me as a Regular Member. I enclose \$50 (\$35 for those earning less than \$30,000 per year).
- ☐ Enroll/renew me as a Contributing Member. I enclose \$100.
- ☐ Enroll/renew me as a Sustaining Member. I enclose \$300.
- ☐ I enclose _____ (\$100, \$150, \$200, or \$250) to prepay my dues for _____ years (\$50 each year).
- ☐ Enroll me as a Lifetime Member. I enclose \$750.
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- ☐ I am contributing \$ _____ as an additional contribution to support SALT's promotion of affirmative action.

Name _____ School _____

Address _____ E-mail _____

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Make checks payable to: Society of American Law Teachers

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

SALT Awards Dinner Reservation Form

January 5, 2004

6:30 p.m. Cocktail Reception; 7:00 p.m. Dinner

103 West Restaurant, 103 West Paces Ferry Road, Atlanta, Georgia

Name _____

Mailing address for tickets _____

Telephone _____

E-mail _____

Note: Tickets reserved by Dec. 19 will be mailed to your mailing address. Tickets reserved after Dec. 19 will be held at the door.

Number in party ____ @ \$65 per person = Total Enclosed \$_____

Please choose one entree per person:

Number of chicken entrées requested _____

Number of salmon entrées requested _____

Number of vegetarian entrées requested _____

Please make checks payable to "Society of American Law Teachers."

Send reservation form and check to Prof. Norm Stein, 12 Columbia Road, Portland, Maine 04103

Questions? Need more information? Contact Norm Stein, nstein@law.ua.edu, 205-348-1136 phone.

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