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ARTHUR GARFIELD HAYS CIVIL LIBERTIES PROGRAM
ANNUAL REPORT 1997-1998

This was an excellent year for the Hays Program and its Fellows and Directors. The 1997-1998 Hays Fellows were Kim Barry (Harriet Pilpel-Planned Parenthood Fellow), Anne Pearson (Robert Marshall Fellow), Sonya Rudenstine (Palmer Weber Fellow), Pamela Sah (Tom Stoddard Fellow), Craig Siegel (Roger Baldwin Fellow), and Steven Ury (Leonard Boudin Fellow).

On May 16th we celebrated the 40th Anniversary of the Hays Program with a reunion that was both warm and intellectually stimulating. It is described below.

Just after the Reunion we were thrilled to hear that Ellen Barry, Hays Fellow 1977-1978, was awarded a MacArthur Prize Fellowship in recognition of her tireless and effective work as organizer and director of Legal Services for Prisoners with Children in San Francisco. Her husband Mike Florio, Hays Fellow 1977-78, is the Supervising Attorney of the public interest organization, Toward Utility Rate Normalization. For many years Ellen and Mike owned and managed a racially integrated blues bar in Oakland, Your Place Two. The MacArthur award is not only a great honor but also a much deserved financial boon for public interest lawyers with two young children. Ellen joins David Rudovsky, 1966-67, and Sylvia A. Law, 1967-68, as the third Hays Fellow to receive the award.

On a sadder note, John E. Smith of Miami, Florida, Graduate Hays Fellow 1962-1963, died suddenly in July. John was a successful corporate lawyer -- his LL.M. at NYU was in taxation -- but he demonstrated as well as anyone the good that a person in that position can do for the poor, for members of racial minorities and for the community as a whole. His law shucks style tended to shroud exceptional intelligence and deep dedication to civil liberties. From the 1960s, when he chaired South Florida's program of legal services, to the day he died, John exemplified the very best that lawyers can aspire to.

Last year the name of the Reed Foundation Fellowship, which was established in 1991, was

changed to the Leonard B. Boudin Fellowship. When the Fellowship was created, it was agreed with Reed Rubin, president of the Foundation, that it would eventually honor a strong first amendment advocate, and it is fitting that Leonard Boudin be the designated person. Leonard, who died in 1989, represented men and women during the McCarthy era who were victimized by congressional investigating committees and blacklists, and he was lead counsel in many important cases, including Kent v. Dulles, 357 U.S. 116 (1958) (first recognition of constitutional right to overseas travel) and Lamont v. Postmaster General, 381 U.S. 301 (1965) (first case declaring a U.S. statute invalid under the First Amendment). For some years Leonard taught a civil liberties seminar at NYU Law School, and he had been a visiting professor from practice at Harvard Law School and the University of California Law School at Berkeley. Not least, he was a man of exceptional charisma and charm.

When the name change was made, we asked Hays Fellows who had been Reed Foundation Fellows whether they wanted to have their records changed to reflect the Boudin Fellowship. Exemplifying a healthy diversity of opinion, the eight holders of the Reed Fellowship divided equally on the question.

We continued our series of informal evenings at which former Fellows discussed their backgrounds, aspirations, successes and disappointments in civil liberties work, and their recollections of their years as Hays Fellows. In the fall we met with Mitch Bernard, Hays Fellow, 1978-79 and now Senior Attorney at the Natural Resources Defense Council. Mitch shared wonderful stories about his work as an inexperienced young lawyer who took on the power structure of New York City and State to stop the construction of Westway. He also described his episodic career as a playwright and the joys of being father to three young children. Because the 40th reunion gave current Fellows an opportunity to meet many former Fellows, we did not schedule an informal evening in the spring.

THE WORK OF THE FELLOWS

As usual, the heart of the Hays Program is the work of the Fellows. They again interned with many leading advocates for civil liberties, and we are deeply grateful to all for their contributions to the Program. At our regular meetings, each Fellow and his or her supervising attorneys, led a discussion of a current civil liberties case on which they collaborated.

The substantive work of the Hays program is largely driven by the interests of the Fellows. In August, dozens of public interest lawyers who have worked with Hays Fellows in the past submit proposals to induce a Fellow to sign on with them. The demand for committed, talented help in public interest work always outstrips the supply and, sadly, most of those who request help from a Hays Fellow are disappointed.

Our core governing principle is to encourage Fellows to work at the jobs, and with the people and organizations, that they find most attractive. This principle is modified in two important ways. First, we generally insist that Fellows take on two different assignments, one in the fall and one in

the spring. We also encourage people to work with organizations and on at least one issue that is new for them. Both of these modifications reflect our view that the Hays Fellowship is a unique opportunity to be exposed to a range of issues and public interest practice styles.

What the Fellows choose to work on indicates what is most important to each generation of law students committed to civil liberties work. Looking back on the choices of this year's Fellows, employee rights emerges as the most important focus, followed by First Amendment issues, race discrimination, education, gay rights, and police brutality. Sometimes, of course, there is overlap, for example between equality and free expression and between political and economic rights.

EMPLOYEE RIGHTS

Americans with Disabilities Act

Leonard F. was an employee of the Israel Discount Bank for seven years before he suffered a debilitating nervous breakdown in 1994 that prevented him from returning to work. He was subsequently eligible for, and received, long-term disability benefits through IDB's insurance policy with Met Life. Unfortunately, this policy terminated Leonard's benefits after two years because he suffered from a mental disorder, although employees who are disabled by a physical disorder are eligible for benefits until age 65 (in Leonard's case, in 2009). Such non-parity insurance discriminates against people who suffer from mental disabilities and is apparently a common feature of LTD policies.

Ed Copeland, Hays Fellow 1977-78, is now General Counsel at New York Lawyers for the Public Interest and represented Leonard F. Craig Siegel, Roger Baldwin Fellow, assisted Ed in preparing for trial in federal court. The lawsuit raised several unsettled questions about the scope and meaning of the ADA's regulation of insurance, and about whether non-parity policies illegally discriminate under the ADA. Leonard F. is one of a series of cases brought by disability advocates and the EEOC.

Craig wrote memoranda on the evidence required to prove that Leonard suffered from a mental disability which significantly impaired a major life activity and thus enabled him to be covered under the ADA; on whether IDB had a right to copies of the drafts of our psychological expert's reports under Rule 26; and on the legislative history and meaning of relevant sections of NY insurance law. He also pored over depositions, participated in meetings and discussions with Ed and Gerald Letwin (EEOC's counsel), and joined them for the final (and successful) settlement negotiation that took place on the first morning of trial.

Drug Testing

Leonard Boudin Fellow Steve Ury spent the spring semester at the ACLU Work Place Rights Task Force directed by Lew Maltby. In light of Supreme Court rulings in Vernonia School District

v. Acton (upholding mandatory drug testing of student athletes) and Chandler v. Miller (striking down mandatory drug testing for political candidates), the ACLU asked Steve to do research that would help them determine the current Fourth Amendment law and formulate a policy in regard to such cases. He wrote a memo describing all federal and state supreme court employee drug testing cases since 1989 as well as his view of the current law and options for the ACLU.

Employees' Retirement Insurance Security Act (ERISA).

In the spring semester, Palmer Weber Fellow Sonya Rudenstine worked for the civil rights law firm Koob & Magoolaghan, researching the viability of an appeal for the recovery of attorneys fees in an ERISA suit in which the plaintiff had been successful in the recovery of benefits. She recommended that the firm pursue the appeal, based on both the legal analysis and the fact that extensive legal fees often eradicate any gain plaintiffs might receive from a successful benefits suit. Sonya also mapped out a legal strategy for the appeal.

Workfare and union organizers access to workers.

In the fall, Robert Marshall Fellow Anne Pearson worked with Marc Cohan at the Center on Social Welfare Policy and Law. At the request of ACORN and a number of other welfare rights organizations, Anne researched the constitutional rights of organizers to gain access to Workfare sites for the purpose of organizing workfare participants. Because workfare participants can be assigned to work for both public and private organizations, her research looked at these questions of access separately. As local ACORN offices requested help, she also examined a number of state constitutions.

Racial Discrimination in Employment.

In the spring semester, Anne Pearson worked with Paul Sonn at the NAACP Legal Defense Fund's employment rights project. She helped to develop an employment discrimination testing program similar to programs that test for housing discrimination. Only two such programs existed, in D.C. and in Chicago, and, after hearing a presentation by the Director of the Chicago program, Paul thought that it would be exciting to start a New York program.

The Inc. Fund decided not to develop the project out of its own offices but rather to encourage its development by a direct service provider. After a number of meetings, the New York Urban League offered to house the project, and the National Employment Law Project offered to litigate some of the cases that come out of the testing venture.

Anne participated in several strategy meetings and conducted research relating to questions of legal standing and organization structure. She reports that "This last question was the trickiest since each group wanted the structure that gave it maximum control over the work and minimum

liability." Anne also did fund-raising research at the Foundation Center.

FIRST AMENDMENT.

First Amendment issues cut across subject matter lines. For example, the rights of union organizers to meet with workfare workers, discussed above, is a first amendment question as well as a question of workers rights.

Religion, Race, and Free Expression.

Tom Stoddard Fellow Pamala Sah worked in the fall semester at the Asian American Legal Defense and Education Fund with Ken Kimmerling. She researched the case of a Sikh man who was denied service at a restaurant for wearing a turban, specifically whether public accommodation anti-discrimination law allowed a claim based on disparate impact (as opposed to discriminatory intent), similar to the standard for employment discrimination under Title VII. She also researched the availability of city, state, and federal claims.

First Amendment/reproductive freedom.

In the spring semester, Kim Barry worked with Catherine Weiss at the ACLU Reproductive Freedom Project on a challenge to U.S. government policy limiting the free speech of international organizations providing family planning services. In 1984 the Reagan Administration implemented the so-called "Mexico City Policy" by Executive Order. It prohibits foreign non-governmental organizations (NGOs) from receiving US-AID funds for any abortion-related activities, and from accepting grants for U.S. NGOs that participate in abortion-related activities. Several foreign and domestic NGOs filed unsuccessful suits against US-AID, claiming that the policy violates their First Amendment rights to free speech and free association. When Bill Clinton was elected President, he repealed the policy. In 1997, several members of Congress attempted to revive the policy by attaching it to a State Department appropriation bill. Kim examined the proposed legislation, compared it to the old Reagan era policy, and analyzed the chances of winning a suit on First Amendment grounds. She also prepared memoranda on the issues for members of Congress as part of the ACLU's lobbying efforts against the bill.

RACIAL DISCRIMINATION

In addition to the work on race discrimination issues in the employment context, described above, Hays Fellows worked on two education-related race cases.

School integration.

In the fall semester Craig Siegel worked for Kimberly West-Faulcon at the NAACP LDF on

two cases. Erik V. v. Dr. James F. Causby is a class action in South Carolina in which public school students challenged a school board's use of a grossly inadequate standardized test to decide grade promotion. Scores of students of color and students with disabilities were being held back despite their adequate grades and class performance. Craig did a detailed analysis of the factual material developed during discovery and then researched and wrote a memo analyzing plaintiffs' special education claims. Craig's memo discussed cases that set forth standards for assessing whether a school system had complied consistently with the requirements of IEPs, whether a school system had administered standardized tests in a manner that accommodated students' disabilities, and whether a school system had complied with federal and state statutory requirements for evaluation of students' needs. The case was eventually settled.

Craig's second case was Wessman v. Boston School Committee, a challenge to the admissions policy of a magnet school by a white student denied admission. The school's admissions policy reserved half of its slots for varying percentages of students from different racial and ethnic populations (based on community demographics). It was initially implemented as part of Boston's school desegregation order, but now was being challenged as intentional race discrimination since the school district had been declared unitary on student assignment (and the federal courts arguably no longer exercised control over the school or had jurisdiction under the desegregation case over the school's admissions policies). Craig wrote a comprehensive memo on the meaning of unitariness and the district court's jurisdiction over the school. He also discussed the evidence of continuing discrimination that a party must show to prove court action is remedial and offered several arguments for finding that the schools' admissions policy was still covered under the desegregation decree.

GAY AND LESBIAN RIGHTS.

In the spring, Pamala Sah worked with Evan Wolfson at the Marriage Project of Lambda Legal Defense and Education Fund. The project is designed to organize and litigate to bring about the legalization of marriage between same-sex couples. Pam did comprehensive research into the issue of international recognition of marriages by looking into a number of comparative law sources, conflict of laws hornbooks, and law review articles. She observes, "While at first this seemed arcane and collateral to the interesting issues, Evan pointed out that this was an opportunity to envision and create new law on a very old subject that is considered largely settled."

In addition, Pamala worked to develop a project to reach out to the "persuadable non-gay public" on the gay marriage issue. She focused on organizations of people of color compiling resources and names. She wrote letters to prominent individuals and organizations, and followed up with phone advocacy to ask them to sign Lambda's Marriage Resolution, a public statement of support for legalization. Pam reports, "This work turned out to be a very interesting exercise in advocacy and remembering how to speak to non-lawyers about political issues. A real strength of the Marriage Project is that it does not limit its work to impact litigation, but instead realizes the need to gather public support in the outside world."

POLICE BRUTALITY

Palmer Weber Fellow Sonya Rudenstine spent her fall semester working for Norman Siegel, Legal Director of the NYCLU. Siegel had just been appointed by Mayor Giuliani to the Mayor's Task Force on Police Brutality. Sonya worked on memos concerning "the 48-hour rule" that protects police officers from being subject to internal police department questioning for 48 hours if they are suspected of engaging in illegal activity. She compiled information on the history of the rule, which was designed to protect officers from internal investigation until they have the opportunity to reach an attorney, and she analyzed the rule's advantages and disadvantages. Pam recommended eradication of the rule and Siegel used her research to make a case to the Task Force. The Task Force did make that recommendation, but it was rejected by the Mayor. Pam also investigated the feasibility of establishing a special prosecutor to handle cases involving police criminality. The Mayor also rejected the recommendation by the Task Force to establish such a special prosecutor.

THE DIRECTORS

Norman Dorsen continued his service with several public interest organizations, primarily the Lawyers Committee for Human Rights, where he chairs the board of directors. In June, in line with his work for the Lawyers Committee, he addressed the U.N. Diplomatic Conference held in Rome on the establishment of a permanent International Criminal Court, and he published Civil Liberties, National Security and Human Rights Treaties, in U. Cal. Davis J. Int'l. L. & Policies 143 (1997). Among Norman's other active affiliations are the Thomas Jefferson Center for the Protection of Free Expression and Planned Parenthood International (Western Hemisphere Division). He served as co-chair of a citizens group, the Emergency Committee to Defend the First Amendment, which was formed in 1989 to oppose the Flag Desecration Amendment. He continued as the first president of the U.S. Association of Constitutional Law, and was elected to the executive committee of the International Association of Constitutional Law. His travels for these groups last year took him to England, Finland, Hungary and India.

As previously reported, Norman chaired the committee that planned NYU's Global Law School Program. After the program was approved, he directed it until early 1996, when he became faculty chair while continuing to head the committee that recommends foreign law professors to the faculty. The Global Law Program has developed new initiatives outside of the Law School, for example a joint program with Oxford University, and within the Law School, for example to integrate the experiences of foreign and U.S. students by bringing them together for substantive and social events. He chaired the plenary panel, on globalization in American law schools, at the annual conference of the Association of American Law Schools. Norman also continued to direct the James Madison lecture series in which federal appellate judges address a constitutional law topic; last year's lecturer was Chief Judge Richard Posner of the U.S. Court of Appeals for the 7th Circuit and this year's will be Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit.

Sylvia A. Law also had a busy year. In July, she worked with the Center for Reproductive Law and Policy to organize a national strategy meeting to explore ways to expand insurance coverage for contraception. In September, she spoke to the Society of American Law Teachers (SALT) conference in Washington, D.C., on the history of U.S. law professor engagement in political activism. In January, at the AALS Conference, SALT led a demonstration of several hundred law professors; most dressed in academic gowns; in support of diversity in legal education. This apparently was the first time in U.S. history that law professors organized and led a demonstration. In May, Sylvia participated in the Third Annual Lat-Crit Conference in Miami Beach. She has continued her work as a Trustee of New York's Interest on Lawyer's Trust Account (IOLA). IOLA programs are a significant support of financial support for civil legal services for the poor, providing almost as much money as the federal legal services program and generally providing them on a less restrictive basis. In June 1998 the Supreme Court, in a sharply divided and ambiguous decision, held that interest on client trust accounts is a form of property, but remanded for a determination whether the IOLA programs "take" property "without just compensation."

As part of her work on the campaign to expand insurance coverage for contraception Sylvia published Sex Discrimination and Insurance for Contraception, 73 Wash. L. Rev. 363 (1998). It argues that the common insurance practice of providing coverage for all prescription drugs except contraception violate's Title VII's prohibition against sex based discrimination. She continued to work on issues of patient control of death and access to pain medication. She joined the Board of Directors of Compassion in Dying and gave a talk on these issues at the AALS conference in January. She published an article, Birth and Death: Doctor Control vs. Patient Choice, 82 Minn. L. Rev. 1045 (1998). As a member of the Family Law Committee of the Association of the Bar of the City of New York, she was the principal author of a report arguing that New York law should be modified to adopt a presumption that custody should be awarded to the person who has served as a child's primary caretaker. Finally, she helped to prepare supplements to her casebook, Law and the American Health Care System (Foundation Press, 1997), in January and again in July.

FORTIETH REUNION

All generations of former Hays Fellows were represented on May 16 at the 40th anniversary reunion of the program. Jordan Derwin '59 and Lewis Stein '60 were present from the first two classes of Hays Fellows, and the younger generation included members of the classes of '98 and '99 (the latter having just assumed their fellowships). Almost half of all former Hays Fellows attended.

Along with the generous libations and meals, panels of Hays Fellows took on three provocative subjects and heard reactions from other Fellows and their guests that were sometimes supportive, sometimes critical and always individualistic.

The first panel, composed of Wayne Outten '74, Sana Shtasel '76 and Jeremy Travis '82, discussed "The civil liberties issue on which my views have changed most dramatically." The upshot was a pretty even division between those who thought that new formulations of civil liberties

were needed to cope with current problems and those who thought that the verities of civil liberties, if properly applied, were sufficient. Sana, President of Maryland Planned Parenthood, argued that the courts have given too much deference to the free speech of anti-abortion demonstrators. Jeremy, director of the Institute of Justice at the Department of Justice, argued in support of more effective policing. Many people who are now managers reacted to Wayne's strong defense of employees' rights.

The second panel, on "Insights into civil liberties from a transnational perspective," featured Mallika Dutt '89, Kathryn Graham LL.M. '97, Rachael Pine '83, and Bob Van Lierop '67. After spirited talk, a contingent of Hays Fellows concluded that "human rights," as embodied in UN treaties, was a better basis for protecting humanity than traditional American "civil liberties," in large part because international instruments covered economic, social and cultural rights as well as political and civil rights. There were dissenters from this view, and much more time would have been needed to explore the ramifications of the issue.

The final panel, on "Why I am sorry or glad that I am a lawyer," featured the most personal statements. Some panelists -- including Frank Jones LL.M. '69, who comes from rural Mississippi -- were very glad they were lawyers, but others were ambivalent, including Bernard Mindich '61, who spent almost two decades as a partner in a major New York firm before embarking on a career as an artist and sculptor. The other panelists were Ellen Barry '78, Jenny Pizer '87, and Mark Risk '84 -- all provided snapshots from their varied and interesting careers.

After a sumptuous dinner, Gloria Steinem, the feminist and author, and Professor David Cole of Georgetown Law School, a leading civil liberties lawyer, delivered keynote talks. Ms. Steinem described the often stifling professional and social scene in the 1950s and discussed some reasons why the modern women's movement has met determined resistance. She said, "I like the Golden Rule. It makes sense to do unto others as you would have them do unto you. Unless you are a masochist." Professor Cole made a general survey of civil liberties at century's end and suggested strategies for achieving new gains. David argued against pervasive cynicism, asserting that the courts and the rule of law are still the best bets for justice in our society.

Although many Hays Fellows and their guests remained at D'Agostino Hall until late in the evening, the official part of the reunion ended with informal remarks by the co-directors of the Hays Program. Sylvia offered some humorous comments on the civil liberties scene; and Norman recounted the early history of the Program and some of its highlights over the years.

THE FUTURE.

Of the 1997-1998 Hays Fellows, Kim Barry has moved to Seattle where she will be clerking for Judge Betty B. Fletcher of the Ninth Circuit Court of Appeals. Anne Pearson will be working in the South Bronx as the 1998 Client Advocacy Fellow at the Osborne Association, which provides integrated services for prisoners and former prisoners. Sonya Rudenstine spent the summer in the

woods near Santa Cruz, studying for the New York Bar, and returns in the fall to clerk on the New Jersey Supreme Court. Pamela Sah will be working in the community economic development unit of Passaic County (NJ) Legal Aid and the following year will be clerking for District Judge William Walls in Newark Federal Court. Craig Siegel became the proud father of a beautiful baby, Delilah, during the spring semester and in the fall will care for her while working parttime for the National Coalition Against Censorship, which is directed by Joan Bertin, Hays Fellow 1972-1973. And Steve Ury is working at Geffner & Bush, a union-side labor law firm in Burbank, California.

The 1998-1999 Fellows will be Derek Baxter (Palmer Weber Fellow); Iris Bennett (Leonard Boudin Fellow); Betsy Ginsberg (Harriet Pilpel Fellow); Eric Levin (Robert Marshall Fellow); Munir Pujara (Roger Baldwin Fellow) and Valerie A. Wright (Tom Stoddard Fellow). We received interviewing help and wise judgment in selecting these Fellows from Sean Farhang, Hays Fellow 1992-1993, an associate in the civil rights firm of Janice Goodman, and Maddy deLone, Hays Fellow 1993-94, a staff attorney with Children's Rights Inc.

ADMINISTRATION

In closing, we express our appreciation for the strong support we have received from the Law School administration, from the indefatigable Evelyn Palmquist, the Program's secretary and administrative assistant, and from the numerous individuals and foundations who have provided financial support. We have made further strides to endow the Deborah Rachel Linfield Fellowship for work on freedom of the press, and we hope to be able to announce next year that it is fully funded. Above all, we are grateful to the scores of former Hays Fellows who have remained in close touch and assisted us as we continue to build a strong civil liberties community at and beyond Washington Square.

Norman Dorsen
Sylvia A. Law

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