

ARTHUR GARFIELD HAYS CIVIL LIBERTIES PROGRAM

ANNUAL REPORT

1989-1990

The Hays Fellows worked this year on a range of vital issues in the areas of free speech, reproductive freedom, sexual harassment, race discrimination in public housing, due process in landlord/tenant court, gay and lesbian rights, immigration, international human rights, union democracy and the right to an adequate education. We cooperated with many old friends, including the ACLU's Gay and Lesbian Rights Project and the Reproductive Freedom Project, the NOW Legal Defense and Education Fund, the Center for Constitutional Rights, and the Civil Appeals and Law Reform Unit of the Legal Aid Society. In addition, one Fellow worked with Chip Gray (Hays Fellow 1967-1968) at South Brooklyn Legal Services and another with Americas Watch. Fellows prepared briefs, researched factual and legal issues, did trial preparation and participated in congressional lobbying efforts.

At the annual Hays Dinner in May we enjoyed Janet Benshoof's tales of her work for reproductive freedom in Guam. Janet, Director of the ACLU Reproductive Freedom Project, flew to that South Pacific island when it adopted one of the most restrictive and comprehensive anti-abortion law yet enacted. In a speech at the Guam Press Club Janet told people that abortions were still available in Hawaii. She was promptly arrested and prosecuted. The heavy handed attempt to suppress speech and reproductive choice backfired. The pro-choice community in Guam has mushroomed and the federal court has enjoined the entire statute, including the provision under which Janet was prosecuted. Guam has decided to appeal this decision.

In June 1990 the Hays Program, together with Planned Parenthood and the ACLU Reproductive Freedom Project, sponsored a symposium on content based restrictions on speech and counseling in federally funded family planning service programs. The federal courts of appeals have reached conflicting conclusions about the constitutionality of such restrictions, and the Supreme Court will resolve the issue within the coming year. The symposium was designed, in part, to aid the lawyers preparing the briefs and arguments to the Supreme Court.

The program worked with Lora Hays, Arthur Garfield Hays's daughter and an independent film maker, to produce a short video about the Program during the 1990-1991 year. The video

is now under active production.

Here is a detailed description of the year's work.

The Fellows

Anne Clark (Robert Marshall Fellow) worked during the fall semester at the NOW Legal Defense Fund under the supervision of Sally Burns, who recently joined the law school faculty. She researched cases and gathered factual data to help in the lobbying effort for passage of the Civil Rights Act of 1990. Anne worked primarily on the portions of the bill dealing with compensatory damages and the proper burden of proof in a mixed motive case such as Price Waterhouse. She located witnesses for congressional hearings, compiled sexual harassment cases in which plaintiffs were not adequately compensated, conducted a phone survey on the race of sexual harassment plaintiffs, analyzed the possible impact of the stereotyping and burden of proof aspects of the Supreme Court's decision in Price Waterhouse. The bill was introduced in the Senate by Senator Kennedy with 33 co-sponsors. Industry fought hard against the damages provision. As of this writing, Congress has passed the bill and is negotiating with the White House to avoid a presidential veto.

In the spring semester Anne worked at the Legal Aid Society's Civil Appeals and Law Reform Unit. She spent most of the semester working with Scott Rosenberg on Davis v. NYCHA, a case charging the New York City Housing Authority with racial steering in housing projects. She did initial research on liability and remedies under Titles VI and VIII and possible statute of limitations problems the case might face. In connection with this case, she attended a conference on housing discrimination in Washington.

Anne also worked on Etuk v. Blackman, challenging an INS practice of depriving permanent resident aliens of their green cards while exclusion or deportation proceedings are in progress. This practice forces resident aliens to choose between not working or seeking unlawful employment. Anne contributed a section on the constitutional right of aliens to work to a summary judgment brief.

Anne is now clerking for Federal District Judge Raymond J. Pettine in Providence, RI.

Andy Dwyer (Palmer Weber Fellow) worked in the fall semester with the Housing Law Unit of South Brooklyn Legal Services. He represented dozens of individual clients in a variety of cases: defending tenants against eviction in non-payment and holdover actions; suing landlords for failure to make repairs; representing tenants before the New York city

Housing Authority; and suing the Housing Authority in Article 78 proceedings involving public housing and Section 8 assistance.

Andy also did research for a lawsuit against the Brooklyn Housing Court, challenging court conditions, practices and procedures that effectively deny most defendants basic due process rights. Tenants in housing court, the overwhelming majority of whom appear pro se, face numerous obstacles in asserting their rights, including conditions and practices which make it extremely difficult for most tenants to answer the petitions brought against them, leading to judgment by default. Tenants who do answer their cases are rarely informed of their rights, which are usually unintentionally waived, and are typically pressured into signing one-sided stipulations that relinquish defenses and give the landlords final judgments in the cases brought against them. Finally, the right of appeal of tenants is so restricted as often to be meaningless. A suit challenging housing court procedures faces numerous problems, including abstention, standing and problems of proof.

In the spring semester Andy returned to the ACLU Reproductive Freedom Project, where he had worked during his first and second years of law school. Under the supervision of RFP staff attorney Lynn Paltrow (Hays Fellow 1982-1983), Andy researched potential legal challenges to the practice of certain municipalities of prosecuting pregnant women for alleged drug use during pregnancy. In addition to being an assault on women's constitutional rights, such prosecutions have adverse health consequences because they discourage pregnant women from seeking prenatal care. Andy also helped draft a brief in support of a motion for summary judgment in a case challenging a recently enacted criminal abortion statute in Guam. The law was passed in large part as an explicit effort to enact religious views of abortion into law, and the brief argues that the statute violates the Establishment Clause.

Finally, Andy worked on In re A.C., a case involving a woman with cancer in Washington, D.C. who was forced to undergo a caesarean section, which left both her and the fetus dead. The ACLU appealed the court's order to the en banc Court of Appeals for the District of Columbia (Andy had worked on the appeal when he was at the RFP in 1988). In the spring of 1990 the Court of Appeals reaffirmed the woman's constitutional and common law right to bodily integrity in the course of vacating the trial court's order.

In September Andy began a one year clerkship with Federal District Judge Dickinson R. Debevoise of New Jersey.

Annette Hurst (Harriet Pilpel/Planned Parenthood Fellow) worked for the ACLU Lesbian and Gay Rights and AIDS Rights Project in the fall semester. Hatheway v. Gannett, the major case on which she worked, presented a difficult conflict between free press and equality. Wisconsin's civil rights statute protects lesbians and gay men. A local newspaper refused two advertisements: one for gay rights t-shirts and the second for a service offering professional, legal and referral group counselling for lesbians and gay men. The Wisconsin state trial court held that the First Amendment protected the newspaper's right to refuse the ads.

Annette helped Nan Hunter to write a brief to the state intermediate appellate court. It argued that, under established Supreme Court precedents, the classified ads were commercial speech, subjected to some state regulation. The brief further asserted that the state had a compelling interest in protecting civil rights, including the equality and free speech rights of gay and lesbian people. The brief concluded that enforcing the civil rights law to prohibit newspaper from rejecting the ads would on balance promote, rather than undermine, First Amendment values, and would advance compelling interests in liberty and equality.

A seminar of the Hays Fellows considered these issues at the point that Annette and Nan were working to develop a position to present to the court. The case presents a classic conflict in fundamental values and produced an illuminating discussion.

During the spring semester, Annette worked with Rachael Pine (Hays Fellow 1982-1983) at the ACLU Reproductive Freedom Project, doing background research on the federal ban on fetal tissue transplant research. The Reagan/Bush Administration has banned such research on the undocumented and improbable ground that it might encourage or promote abortion. Annette documented the potential therapeutic benefits of such research and treatments for many neurological and immunological disorders. This research supported an Administrative Procedure Act challenge to the funding moratorium that had been adopted without public notice or comment. She attended Congressional hearings on the issue and drafted ACLU testimony before Congress.

Annette is now working in a law firm in San Francisco.

Monica Shurtman (Roger Baldwin Fellow) spent the fall semester assisting Helen Hershkoff of the ACLU National office with two projects. The first concerned the scope and enforceability of a state's obligation to provide adequate public education. Monica explored the feasibility of judicially compelling New York officials to comply with the

minimum standards regulations promulgated by the Board of Regents. This research stemmed from concern with charges by the state comptroller that the Board of Regents has neglected to fulfill its constitutional and statutory mandate to guarantee each child in New York City the opportunity to receive a sound, basic public education. As part of her research, Monica looked at the possibility of bringing a tort action for educational negligence or malpractice when a state fails to educate adequately. In addition, she prepared a state-by-state analysis of judicial opinions mandating compliance with state education statutes and regulations.

The second project consisted of research regarding United States of America v. International Brotherhood of Teamsters. As part of the consent decree entered in the case, the IBT rank-and-file won the right to hold supervised elections with specific democratic safeguards built in to avoid the kinds of fraud that had marked past elections. Monica sought to develop theories to convince the election officer and the court to alter a portion of the consent decree that would preclude dissident candidates from accepting limited outside campaign contributions. The practical result of this prohibition would be that the long-entrenched IBT leadership would far out-finance their opponents, and the goal of free and fair elections would be jeopardized.

During spring semester, Monica worked with Ken Anderson, consultant to Americas Watch, analyzing the legal status of Guatemalan civil defense patrols. The Guatemalan army organized these patrols as part of a counterinsurgency program to consolidate military and political control. Under the patrol system, civilians living in particular areas--generally, those regions with a large indigenous population--are forced to provide back-up support to the army. Patrol service is compelled and unpaid, and of indefinite duration. Villagers are required to report neighbors suspected of subversive activities, to patrol towns to keep out opposition forces, and sometimes to participate in intimidation, death threats, or disappearance and death. Monica researched and wrote about why the patrols are illegal under international law and Guatemalan domestic law. The analysis will be used by human rights groups active in opposing the patrols.

This year, Monica is working with the South Bronx civil trial office of the Legal Aid Society of New York.

In March, after the usual two rounds of interviews, Norman and Sylvia selected the follow second year students to be fellows for the 1990-1991 academic year: Crystal Crawford, Susun Kim, Jeffrey Levin, Michael Rothenberg, Emily Sack, and Terry Staudenmaier. We acknowledge the assistance that Stefan Presser (Hays Fellow 1978-1979) and Marianne Stecich

(Hays Fellow (1997-1978) provided in the interviewing and selection process.

The Directors

Norman Dorsen spent a great deal of time this year on two major controversies. The first was the effort to enact the Civil Rights Act of 1990, in favor of which he testified before the House Committee on Education and Labor in February 1990. The other controversy was the vigorous struggle over flag desecration. Norman lobbied Congress directly and through a national emergency committee he helped organize to defeat the proposed constitutional amendment to permit prosecution for desecration. He then was co-counsel in the ACLU's amicus brief that successfully argued in U.S. v. Eichman that a congressional statute authorizing prosecutions violated the First Amendment.

During this period Norman published an article on Foreign Affairs and Civil Liberties in the Bicentennial issue of the American Journal of International Law and a heartfelt tribute in the NYU Law Review on Leonard Boudin, a leading civil liberties lawyer who collaborated over the years with many generations of Hays Fellows.

In May 1990, Norman announced that this year would be his last year as president of the ACLU. He will step down in January 1991 after more than 14 years in the post.

In the fall semester Hays Director Sylvia A. Law taught at the CUNY Law School in Queens. This school successfully trains lawyers for public interest work through a pervasive method of planning/doing/reflecting. Sylvia also published a casebook growing out of her earlier work with Edward V. Sparer at the Health Law Project at the University of Pennsylvania. (American Health Law (with George Annas, Rand Rosenblatt, and Ken Wing), Little Brown, 1990). In addition, she published "Conversation Between Historians and the Constitution," 12 The Public Historian, No. 3 (Summer 1990); an article on domestic violence for the ABA Judges Journal; and a response to William Donohue's attack on ACLU policy in the area of economic justice.

Sylvia was elected President of the Society of American Law Teachers, a membership organization of American law teachers that Norman Dorsen founded in 1973.

Finances and Fellowships

The Hays Program has continued in a satisfactory financial condition despite increased expenses largely due to higher tuition charges at N.Y.U. Law School that were inevitably translated into an increase in the size of the fellowship

awarded to the Fellows. Furthermore, contributions to the Program declined somewhat from the levels of 1988 and 1989. Balancing this trend was the receipt from the Reed Foundation of the final payment of a four-year grant to establish an endowed fellowship in the Hays Program especially dedicated to First Amendment issues. Pending the naming of the fellowship after a First Amendment scholar and litigator, this will be designated the Reed Foundation Fellowship.

October 1990

Norman Dorsen
Sylvia A. Law