

ARTHUR GARFIELD HAYS CIVIL LIBERTIES PROGRAM
ANNUAL REPORT
1990-1991

The Hays Fellows worked this year to protect civil rights and liberties in the areas of free speech, the rights of pregnant women, racial discrimination in public housing, education and the arts, gay and lesbian rights, immigration, and police brutality. We cooperated with many long time allies, including the ACLU's Women's Rights Project, Gay and Lesbian Rights Project and Immigration Rights Project, the New York Civil Liberties Union, the NAACP Legal Defense and Education Fund, Inc., the Center for Constitutional Rights, the Civil Appeals and Law Reform Unit of the Legal Aid Society, South Brooklyn Legal Services. One fellow worked with the Center for Law and Social Justice at Medgar Evers College.

The 1991 Fellows were Crystal D. Crawford (Palmer Weber Fellow), Susun Kim (Roger Baldwin Fellow), Jeffrey Levin (Palmer Weber Fellow), Michael Rothenberg (Robert Marshall Fellow), Emily Sack (Harriet Pilpel-Planned Parenthood Fellow), and Terry L. Staudenmaier (Reed Foundation Fellow).

In the life of the Hays Program, perhaps the year's most significant event was Norman's decision to step down as president of the ACLU, after more than 14 years in that demanding position. Already the Program has benefited from the increase in attention that Norman has to give to it.

Lora Hays, Arthur Garfield Hays's daughter who is an independent film maker, took the lead in producing and editing a ten minute video about the Program, which we shall send to all of you after it is released later this year. The film features the 1990-1991 Fellows, as well as former Fellows Thomas B. Stoddard (1976-1977), Patricia Hennessey (1978-1979), Lynn Paltrow (1982-1983), and Mitra Behroozi (1985-1986). Making the video was fun and the previews have been well received.

On April 23, we were all saddened by the death of Harriet Pilpel. Emily Sack and Sylvia were scheduled to meet with Harriet just days later for the annual luncheon to discuss the year's work. Attached to this Report is a tribute to Harriet Pilpel written by Sylvia Law.

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

First Amendment. Michael Rothenberg helped to represent Karen Finley and other performance artists who were denied grants by the National Endowment for the Arts (NEA). The lawyers on the

case included David Cole (volunteer for the Center for Constitutional Rights and a faculty member at Georgetown Law School), Nan Hunter (now on the faculty at Brooklyn Law School), Ellen Yaroshefsky (now of the Cardozo Law School) and Mary Dorman. Grants for these artists had been approved by the NEA's peer review panels. But the NEA's Council, which generally rubber stamps the peer review recommendations, withdrew the grants. The artists contend that the Council acted in response to months of agitation by Senator Jesse Helms and others against "inappropriate art."

Michael accomplished four tasks for this suit. First, because the artists and officials lived in various parts of the country, suit could be filed in one of several circuits. Michael read the relevant cases and consulted with lawyers to aid the decision to file suit in Southern California, with Paul Hoffman of the ACLU acting as local counsel. Second, Michael researched the Administrative Procedure Act, which provides for judicial review of government agencies' actions applied to this unusual denial of grant applications by the NEA. He concluded that the NEA statute provided the necessary guidelines and criteria to provide a court with standards against which to measure the legality of the agency's action. Finally, Michael drafted interrogatories and requests for production. Weeks later, when the documents were produced, he read them and prepared a description of each. On September 18, 1991, the New York Times reported, "Government documents released yesterday show that the National Endowment for the Arts yielded to political pressure last year in overturning grant recommendations for four sexually explicit performance artists. . . ." The suit is still pending.

Crystal Crawford also did first amendment work with the Center for Law and Social Justice at Medgar Evers College. She helped to represent minority arts organizations who assert that the New York State Council on the Arts has engaged in racial discrimination, as evidenced among other things by the fact that minority organizations receive a disproportionately small proportion of grant money. Crystal researched cases and prepared an analysis on possible first amendment claims, including both viewpoint and subject matter discrimination, as well as drafting a memorandum on the use of statistical evidence to prove intentional discrimination under the Fourteenth Amendment.

Pregnant Women. Emily Sack worked with the Women's Rights Project of the ACLU under the supervision of Associate Director Joan Bertin, (Hays Fellow, 1972-73). Most of her work focused on issues related to child neglect cases brought by the government against women who had taken drugs or alcohol during pregnancy. Project attorneys had become involved in these cases because they were concerned about the state's use of child neglect statutes to control the behavior of pregnant women, while avoiding the real problems of the unavailability of alcohol and drug treatment

programs, and the frequent exclusion of pregnant women from existing programs. The Project had successfully defended many of these cases on the ground that the statutes were not intended to address women's pre-natal conduct, but many states thereafter amended statutes to address such conduct. The Project wanted to develop constitutional arguments against government reliance on pre-natal conduct in child neglect cases.

Emily first researched these issues for an appeal of In the Matter of Stafanel Tyesha C. to the New York Court of Appeals. Although that case was dismissed as moot, Emily continued to work on a comprehensive memo on the constitutional issues raised by the use of pre-natal conduct in child neglect and abuse cases, with a particular focus on the use of drug testing. It concludes that there are strong arguments against state reliance on pre-natal conduct, as measured by drug tests of either the pregnant woman or the newborn. Such tests often violate a woman's rights to procedural due process, and related substantive rights, including the right to bodily control, family integrity and decision making autonomy. The memo will serve as a basic resource for the Project.

Emily also worked with Joan to develop a strategy for State v. Owens, a South Carolina criminal child neglect prosecution, then at its initial stages. She researched a constitutional challenge based on claims addressed in the earlier memo, as well as potential equal protection claims. NYU Law Prof. Marty Guggenheim (Hays Fellow, 1970-71) was helpful in strengthening Emily's memo on case strategies.

Finally, in the spring Emily worked on another Project concern: "fetal protection" policies which discriminate against women in the workplace. International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991), held that Title VII of the Civil Rights Act condemned a company policy broadly prohibiting women, but not men, from doing work in which they are exposed to lead. Because lead can affect the reproductive capacity of both sexes, and because many workers do not intend to have further children, the Court held that such policies constituted facial gender discrimination. The Court rejected the company's claim that gender was a bona fide occupational qualification (BFOQ) for the work. Following the decision, Project attorneys were asked to make presentations to business and legal groups on its ramifications, including the issue of potential tort liability of employers for pre-natal injuries. Emily researched and wrote a memo on that issue, focusing on the interplay of worker compensation laws and tort claims for pre-natal injuries in the workplace.

Crystal Crawford also did work on pregnant women, in her case teen-agers who encountered difficulties in completing their high school education. She worked with the NAACP Legal Defense and

Educational Fund to prepare a suit on behalf of pregnant and parenting students. LDF and other civil rights organizations are concerned that these students face discriminatory policies that violate Title IX of the Education Amendments of 1972. Crystal did empirical research on the needs of pregnant and parenting teens and the programs now offered in the New York public schools, analyzed the cases that have been decided under Title IX, and drafted a complaint and supporting memoranda.

Racial Discrimination. In the spring semester Terry Staudenmaier worked with Scott Rosenberg and Michelle Adams at the Legal Aid Society's Civil Appeals and Law Reform Unit. Her work focused on aspects of a Fair Housing Act suit against the New York City Housing Authority challenging racial segregation in New York public housing. She prepared an extensive memorandum analyzing how a Justice Department enforcement action against the Housing Authority would affect tenants who asserted the same claims in federal court litigation. She also explored whether her clients, the tenants, would have an opportunity to object to a proposed settlement of the Justice Department's suit. In addition, she gathered consent decrees from similar cases against Housing Authorities around the country and prepared memos highlighting provisions that might be useful in settlement of the New York case. Finally, she prepared a rough draft of a proposed consent decree settling the case.

Crystal Crawford also worked on racial discrimination issues with Joseph Fleming, counsel in the "curriculum of diversity" case, a class action suit filed in the Southern District of New York in 1990 by a group of African-American students. It alleges that the curriculum employed by New York City is discriminatory because it is eurocentric and unfairly excludes other cultures, thereby violating the Fourteenth Amendment and Title VI. Crystal researched the Title VI claim and served as coordinator for approximately forty student volunteers who were doing fact finding and research for the case:

Gay and Lesbian Rights. Jeff Levin worked for the Lesbian and Gay Rights Project/AIDS Task of the ACLU for the entire academic year on a variety of matters, including cases involving the rights of lesbians to enjoy custody and visitation of their children, the right of confidentiality and informed consent for persons with AIDS, the right of prisoners to attend religious services with other gay and/or lesbian inmates, the right of gay men to gather on private land without harassment by law enforcement authorities, the right of gay men and lesbians to enjoy consensual adult sexual relations in the privacy of their homes without state interference, the right of persons with AIDS to the same housing, employment and welfare benefits enjoyed by those who are not afflicted with AIDS. Jeff wrote briefs and memoranda, handled some cases on his own, and participated in public education projects. He worked in concert with the group

ACT UP on a political action project to attempt to persuade labor unions to rescind the AIDS-exclusionary disability insurance packages. In addition, Jeff worked with NYU Law graduate Liz Cooper on a project to expand access to AIDS diagnosis and experimental treatment for women.

Immigration. Susun Kim worked at the Immigrants Rights Project of the ACLU with Lucas Guttentag and Judy Rabinovitz (Hays Fellow, 1984-1985). She analyzed the Immigration Act of 1990, which contains a new version of provisions for exclusion and deportation on ideological grounds. In 1990, in response to persistent criticism and challenge, Congress repealed all existing laws on ideological exclusion and deportation, notably the McCarran-Walter Act of 1952. The new law substitutes provisions allowing exclusion and deportation for "security and related grounds," and specifies four grounds for exclusion: unlawful activity, terrorist activity, adverse foreign policy consequences and, solely for people seeking to become permanent U.S. residents, membership in a totalitarian party. Susun closely scrutinized the new law, explored possible constitutional challenges on grounds of vagueness, free speech and procedural due process, and analyzed the strength of these claims in challenging exclusions or deportations in a variety of factual contexts.

Police Brutality. Terry Staudenmaier worked during the fall with Norman Seigel at the New York Civil Liberties Union. She did research and prepared for a suit challenging prison guard brutality at Rikers' Island. She also researched the question whether the City would be bound in this litigation by findings of fact made in an earlier suit challenging the inadequacy of the training provided to correctional employees.

In addition, Terry worked on an NYCLU project to reform the Civilian Complaint Review Board (CCRB), and to improve procedures for handling complaints of police brutality. She drafted an amendment to the City Charter, incorporating recommendations from CCRB and an NYCLU report on police brutality. She then researched and wrote a memorandum about the procedures for amending the City Charter through voter initiative, and possible legal challenges to such an initiative. In conjunction with this work, she attended meetings of a coalition of people concerned with reforming the procedures for handling police brutality complaints.

Crystal Crawford also worked on police brutality issues, helping the Center for Law and Social Justice to update its police brutality brochure. She researched the post-1985 cases regarding investigatory steps, searches, seizures and arrests and drafted a memorandum summarizing those cases which either expanded or contracted legal protection in these areas.

Following graduation, Crystal Crawford took a summer position with a Los Angeles firm to reduce her debt burden, prior to starting work to organize a program to improve educational services for a public interest group, CALL FOR DETAILS. Susun Kim is in San Francisco working with a law firm. Jeffrey Levin is working in southern Texas for Texas Rural Legal Aid. Terry Staudenmaier is in Washington, D.C. hoping to button down a public interest position there. Emily Sack is clerking for Federal District Court Judge Leonard Sand and reports that much of the work she did for Joan Bertin on privacy issues is helpful in her work at the court. Persistence paid off for Michael Rothenberg, who landed a job in September as a staff attorney with South Brooklyn Legal Services under former Hays Fellow Chip Gray (1967-1968).

The Directors

As noted above, in February Norman Dorsen stepped down as president of ACLU after holding the position since December 1976. He worked on a variety of transitional issues with his successor, Nadine Strossen, a professor at New York Law School. But he also continued his writing, producing among other things a tribute to former Justice William J. Brennan, Jr. in 104 Harv. L. Rev. 15 (1990), and an introduction to a new edition of former Hays Fellow Stephen Gillers's (1967-1968) book, Looking at Law School. Norman also spent ten days in January on a mission to Northern Ireland with former Hays Fellow David Rudovsky (1967-1968) and Helsinki Watch staff member Lois Whitman. Their report, Human Rights in Northern Ireland, has just been completed.

As President Elect of the Society of American Law Teachers, Sylvia A. Law worked on a variety of SALT projects, including a conference at NYU on the law school influence on student decisions whether to enter public interest work, and a successful effort to defeat the nomination of District Judge Kenneth Ryscamp to the 11th Circuit Court of Appeals. She published, "Some Reflections on Goldberg v. Kelly at Twenty Years," 56 Bklyn L. Rev. 805 (1990) and gave talks on the future of civil rights at the University of Montana, Macalester College in St. Paul Minnesota, and at the Association of American Law Schools annual meeting.

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