

ARTHUR GARFIELD HAYS CIVIL LIBERTIES PROGRAM  
ANNUAL REPORT  
1991-1992

This year the Hays Program was characterized by a number of familiar activities as well as some innovations. As in past years, the Hays Fellows worked with public interest organizations to advance civil liberties for a wide range of people, including pregnant women, lesbians and gay men, artists, poor tenants, and hospital patients. A detailed description of these activities may be found below.

One innovation was the first West Coast Hays reunion, which was held in San Francisco on March 21 and 22, 1992. Fourteen of the 16 former Fellows living in California joined us at the various events. (Through an expansive geographical definition, we invited former Fellows living in Alaska, Oregon, West Texas and Hawaii, but they were unable to attend.) The reunion began with a Fellows-only meeting on Saturday afternoon, to renew old ties and to discuss issues and lives. That evening there was a gala Chinese banquet attended by Fellows, their guests, and about 25 public interest lawyers and community leaders from the Bay Area. A Sunday brunch wound up the weekend. Former Fellows Jenny Pizer (1986-1987) and Anne Zinkin (1987-1988) were instrumental in making local arrangements and insuring the success of the reunion.

Speaking of reunions, the Program's 35th anniversary will be commemorated next year. We are planning the traditional five year event for September or October 1993; we'll advise as soon as we have a tentative date.

The second innovation this year was the introduction of a series of informal evenings at which a former Fellow meets with the current Fellows to discuss their backgrounds, aspirations, successes and disappointments in civil liberties work. Current Fellows thus get to know some of their predecessors and former Fellows meet the new generation on a personal level with discussion of cases or substantive issues only incidental. The former Fellows who participated in the first year of the series were John "Chip" Gray (1967-1968), Patty Hennessey (1978-1979), and Bob Van Lierop (1966-1967). The evenings were well received, and we plan to continue the program next year.

Another feature of the year was the distribution to all of you and to friends of the Hays Program the ten minute video that was made by Lora Hays and Chris Pelzer. We used the video to good effect to advise applicants for next year's Fellowships about the Program.

Sylvia was on sabbatical leave during 1991-1992. As the summary below reveals, she maintained a heavy and interesting schedule of activities, as well as finding time for some R & R.

This was Norman's first full academic year without the burden of ACLU responsibilities. He was able to devote enough time to the Program to obviate the need for an acting co-director from the faculty, an assignment undertaken by former Hays Fellows Steve Gillers (1967-1968) and Marty Guggenheim (1970-1971) on earlier occasions when Norman or Sylvia was on sabbatical leave.

The 1991-1992 Fellows were Jay Brown (Reed Foundation Fellow), Clarke Bruno (Robert Marshall Fellow), Sarah Ludwig (Roger Baldwin Fellow), Winnie Martin (Palmer Weber Fellow), Ellen Ross (Robert Marshall Fellow), and Katie Watson (Harriet Pilpel/Planned Parenthood Fellow). A description of their work and that of the directors follows. Here is a detailed description of the year's work.

First Amendment. Jay Brown worked on several obscenity cases during his semester with Marjorie Heins at the ACLU's new Arts Censorship Project. Jay researched questions of collateral estoppel and malicious prosecution in the case of an Oklahoma physician who was prosecuted on obscenity charges for displaying a federally approved, sexually explicit AIDS prevention poster in his clinic window.

Jay also evaluated the claim of photographer Jock Sturges. After Sturges was charged with child pornography, the police conducted a sweeping search and seizure of his possessions. The charges were later dropped. Jay researched whether the search violated Sturges' fourth amendment rights and gave rise to a Bivens cause of action.

In addition, Jay researched and drafted a portion of a brief filed on behalf of Karen Finley and several other performance artists who challenged the NEA's grantmaking policies. Finally, he researched the admissibility of expert testimony in an action arising out of the City of Chattanooga's refusal, on obscenity grounds, to permit producers of "Oh! Calcutta!" to lease a public auditorium.

Winnie Martin worked with Rob Levy at the New York Civil Liberties Union to fight an unduly narrow rally permit. Through her research, Winnie discovered material suggesting that the Police Commissioner abused his discretion when he refused to permit protesters at Tompkins Square Park to use amplification devices for bands and did not allow the use of adjacent city streets for rally overflow. The NYCLU was successful in efforts to broaden the permit.

Katie Watson worked in the first amendment area during her stay at the Center for Constitutional Rights. Professors in ethnic studies departments are commonly told that their work is "too political," and not "scholarly" enough to qualify them for hiring or tenure. Katie assisted Sara Rios by researching how CCR might

frame an academic freedom claim for a Chicano Studies professor who was refused an appointment on these grounds. Because universities have a strong interest in retaining independence to define standards of scholarship, the conflict of professors' academic freedom with this independence raises the sensitive first amendment questions.

Reproductive Freedom. Clarke Bruno spent the academic year at the ACLU's Reproductive Freedom Project, on the working cases of Jane L. v. Banqerter and Barnes v. Moore. Jane L. is a facial challenge to a Utah statute that criminalizes abortion in almost all circumstances. Clarke worked with pro-bono counsel to develop arguments for free exercise and establishment clause challenges to the statute. He also assessed the statute's impact on high risk obstetrical procedures, and prepared memos to guide ACLU attorneys in their examination of expert witnesses on the topic. Unfortunately, the court granted the state's motion to dismiss all the ACLU claims except the core privacy claims and the challenge to the fetal experimentation provision, and it reserved decision until the Supreme Court decision in Casey v. Pennsylvania is handed down.

In Barnes, Clarke helped to combat a Mississippi statute requiring a 24 hour wait and a physician speech on the morality of abortion before a woman can exercise her right to choose. Mississippi appealed a preliminary injunction the ACLU won in the case, and the ACLU sought to avoid a damaging Fifth Circuit opinion like the Third Circuit opinion in Casey. Therefore, Clarke researched the procedural arguments to support the contention that the case should be remanded to the lower court for a full trial before the appellate court considered the statute.

Also on the procedural front, Clarke researched arguments to oppose the state's plans to appeal the district court decision in Soujourner T. v. Roemer directly to the Supreme Court, bypassing the Fifth Circuit. Finally, Clarke wrote a memo in response to Wyoming's anti-abortion initiative, describing the state initiative process and ways to challenge it.

Katie Watson also worked in the area of reproductive freedom. She joined CCR attorneys Joan Gibbs and Suzanne Shende to produce an amicus brief for Casey v. Pennsylvania. The brief focused on the impact that the restrictive Pennsylvania statute has on the lives and choices of poor women and women of color. It argued that Justice O'Connor's undue burden standard does not require that a statute burden all or most women "unduly," but that if a significant number of women are unduly burdened, then the statute is unconstitutional. It then demonstrated that the statute places an undue burden on poor women and women of color.

Katie also prepared a memo surveying a recent surge of state laws and proposals which limit increases in AFDC grants for additional children. These proposals are part of a national trend

of states trying to contain welfare costs by connecting AFDC grants to "responsible behavior." Proposals to limit increases in AFDC grants for additional children are often components of welfare reform packages which tie benefits to other constitutionally protected behavior such as marriage, using birth control (usually Norplant), and, for mothers under eighteen, living with their parents.

Race. Sarah Ludwig spent a semester at the Center for Law and Justice at Medgar Evers College in Brooklyn, where she developed a memo exploring a theory of culture as a basis for discrimination. Center attorney Dianne Dixon was interested in learning the possibilities of developing claims relating to a range of situations, from those involving discrimination on the basis of language and accent to hairstyle and dress. To accomplish this task, Sarah immersed herself in critical race theory, articles on law and cultural discrimination, and case law. She also examined countless first amendment cases, and found that parties prevailed only when the court found their culturally-based claims inextricably linked to religious freedom. Recognizing the difficulty of prevailing on these theories, Sarah outlined the most persuasive equal protection and due process arguments for the Center and the factual scenarios in which they would be most effective.

Ellen Ross also tried to develop a new type of race discrimination claim. While working with Helen Hershkoff at the National Legal Department of the ACLU, Ellen researched the prospect of using Title VI as a vehicle to challenge environmental racism. Her memo will help to form the basis of a booklet on the topic, which will be distributed to ACLU affiliates that are considering pursuing such claims.

Katie Watson worked with CCR's Anti Biased Violence Project to frame a race discrimination law suit against the Milwaukee Police Department. The complaint arises from the handling of the Jeffrey Dahmer case, and it alleges that the police ignored complaints about Dahmer's activities because of the race of the citizens who complained, the racial composition of the neighborhood, and their hostility toward gay men. The police failed to intervene when one of Dahmer's victims, a young Laotian boy who had been drugged, escaped into the street naked and bruised. When the cops arrived they accepted Dahmer's explanation that it was just a gay lovers' quarrel, and returned the child to Dahmer, over the protests of the (African American) neighbors standing in the hall. If they had asked for any ID they would have learned that the victim was a minor, and that Dahmer had served jail time for molesting his brother. The boy and four others (including the son of the named plaintiffs, a gay African American man) were subsequently murdered. Katie researched the issues of causation, police inaction, and discriminatory provision of police protection, and wrote a memo on possible ways of framing a § 1983 claim in the case.

Capital Punishment. Ellen Ross spent her second semester working with George Kendall at the NAACP-LDEF, assisting in the representation of an African American death row inmate in Georgia, Victor Roberts. Mr. Roberts was accused of murdering a young white woman. The crime occurred on February 1st, and by the end of March Mr. Roberts was tried, convicted, and sentenced to death. The appointed defense attorney, who had never tried a murder case before, asked for continuances before trial, but the judge and prosecutor were both adamant that no continuances be granted. Mr. Roberts counsel did not adequately investigate, did not fully prepare a defense, and did absolutely no preparation for the penalty phase of the trial.

Ellen accomplished four tasks for this suit. First, she researched the ineffective assistance of counsel claim based on the impact of counsel's own admissions of ineffectiveness, both pre- and post-trial. Second, she analyzed the transcript of a state habeas proceeding in order to show that the state judge's fact findings regarding defense counsel's ineffectiveness were unsupported by the record. Third, she researched whether Mr. Robert's absence from a conference immediately before the penalty phase, in which the judge and counsel discussed potential mitigation evidence, might be grounds for reversal. Finally, Ellen surveyed every Georgia case dealing with "plain error" in jury instructions, to ascertain what errors Georgia appellate courts will consider absent an objection at trial.

Health Care. Winnie Martin wrote two memos for the NYCLU concerning New York's Comprehensive Psychiatric Emergency Programs (CPEPs). CPEPs were developed by New York in response to the rising crisis in emergency room overcrowding by providing staffing, outreach, and other immediate needs for psychiatric patients. Although the state legislature allocated funds for this purpose, the Division of Budget claimed that due to New York's fiscal crisis it could not allocate them. Winnie's first memo surveyed New York's statutory law to determine if there were provisions relevant to the tranference of funds from closing mental health hospitals to local group homes. Winnie's second memo on the topic examined the issues of separation of powers and the discretion of officials in charge of allocated funds.

Katie Watson spent the fall semester at the Law and Ethics Division of Montefiore Hospital, where she worked closely with Nancy Dubler, a lawyer, and John Arras, a philosopher, on issues of medical ethics. The bulk of Katie's time at Montefiore was spent in the Obstetrics Unit. There she became engaged in a controversy over whether pregnant women who have medically necessary ultrasonograms should be told the sex of their fetus. The practitioners were split on the propriety of giving this information. Some thought knowledge of sex promotes maternal/fetal bonding. Others believed that partners are less likely to be with the mother during labor and delivery when the sex of the baby isn't

a surprise. Still others were concerned about the impact of maternal disappointment with fetal sex, and the potential for sex selection abortions.

Katie assisted a group of obstetricians, midwives and radiologists who were charged with the task of developing a hospital policy governing the topic. In the end, Katie drafted a policy which insists on patient control of this sensitive information. The policy adopts an informed consent model, which is intended to help each pregnant woman to make the decision which is best for her. Katie finished the committee's work by co-authoring an article on the topic with the head of the Obstetrics Unit, Dr. Joanna Schulman, which will be published in a medical journal.

Jay Brown devoted his spring semester to working with Jane Greengold Stevens on Evelyn v. Kings County Hospital, a class action brought by Brooklyn Legal Services on behalf of Medicaid-eligible residents of Brooklyn. The complaint alleged lack of adequate care at the hospital across a broad range of services, including nursing, medical record-keeping, nutrition, and emergency room care. Jay created a strategy for proving at trial the correct standard of care to which the various hospital departments should be held. In order to accomplish this assignment, Jay exhaustively researched the few similar actions which have been brought in the past, compiled a library of relevant professional standards, created a bibliography of scholarship concerning a right to healthcare, and identified potential expert witnesses.

Housing. Winnie Martin encountered issues of public housing and the first amendment right of association during her tenure at the NYCLU. Under a recent federal statute, it is legal to include an addendum to a public housing lease which allows eviction for drug related activities of the tenant or a member of the tenant's household. Winnie researched the constitutionality of such provisions and wrote a memo outlining the federal regulations and their constitutional limitations.

Sarah Ludwig spent the spring semester assisting the Housing Unit of South Brooklyn Legal Services in its quest to provide nuts-and-bolts advocacy to low-income tenants. The Housing Unit plans to challenge the anti-tenant policies and practices of the landlord of many of their clients, the New York City Housing Authority (NYCHA). Sarah worked on the formulation of this class action lawsuit by researching the legality of two of the NYCHA's practices: 1) the eviction of public housing tenants for chronic late payment of rent, despite the possibility -- and in some cases actuality -- of arranging for direct rent payment by the Department of Social Services; and 2) the NYCHA's refusal to accept partial rent payments from tenants in rent arrears, carrying through with evictions even when tenants have tendered substantial portions of their back rent.

Sarah also wrote a memo on the city's duty to seal an abandoned building deemed unsafe by a city building inspector. The client was a community group that sought to have a dangerous building secured by compelling the city to follow its own regulations regarding unsafe structures.

Sarah's last contribution to the Housing Unit was to design a set of pro se papers for tenants who receive notice to vacate their apartments from banks that have foreclosed on the properties in which they live. The papers are geared to tenants who have no legal right upon foreclosure to remain in their homes, but who can move to have their eviction date stayed, sometimes up to six months or more. The pro se papers Sarah drew up will allow a paralegal or a lawyer to produce court papers for legally unrepresented tenants in a matter of minutes.

Education. Ellen Ross worked to frame Harper v. Hunt, a case designed to attack resource disparities between poor and wealthy school districts in Alabama. She wrote a memo for the ACLU legal department which detailed the educational resources to which the Alabama plaintiffs have the strongest legal claim. This involved sifting through detailed regulations for school accreditation, teacher certification, and courses of study. The Harper plaintiffs won a partial summary judgment, holding a provision of the state constitution unconstitutional. Ellen also did the research to support a motion to certify this partial summary judgement as final.

Following graduation, Jay Brown joined a small litigation firm in Washington, D.C., Ross Dixon & Masback. One of his first assignments will be a year-long research project concerning health insurance regulations respecting people with HIV which Jay and the firm have agreed to undertake for the AIDS Project of the ACLU. In a meeting of minds in a year of lively debate, Clarke Bruno, Sarah Ludwig, Winnie Martin, Ellen Ross, and Katie Watson have all chosen to begin their careers with clerkships. Clarke is clerking for Federal District Court Judge Walter Rice, Southern District of Ohio. Sarah is clerking for Federal District Court Judge Joseph Rodriguez, District of New Jersey. Winnie is serving as a motions clerk for the U.S. Court of Appeals, Second Circuit. Ellen is clerking for Magistrate Judge Ted Katz, Southern District of New York. Katie is clerking for Federal District Court Judge Richard Enslin, Western District of Michigan.

### The Directors

Norman, former Hays Fellow Dave Rudovsky (1966-1967) and Lois Whitman of Helsinki Watch, produced an extensive report, Human Rights in Northern Ireland, detailing findings and conclusions from their human rights mission in January 1991. Norman published an article in 36 N.Y.L.Sch. L. Rev. 81 (1991) as part of a symposium commemorating the 20th anniversary of John Marshall Harlan's

departure from the Supreme Court and the centenary of New York Law School, Harlan's alma mater. (An abbreviated version appeared in the Journal of Supreme Court History.) He also published a lecture entitled Celebrating (?) the Bill of Rights: The Root, Branch and Foliage of American Liberty in 80 Ky. L. J. 843 (1991-92), that was initially delivered as the first Oberst Human Rights Lecture at Kentucky Law School. Paul Oberst, some readers may recall, was the director of the Hays Program from September 1959-March 1961, just prior to Norman's assuming the post. Norman also had the sad responsibility to publish memorials to two outstanding academics who died recently -- Albert Sacks, former dean of Harvard Law School, 105 Harv. L. Rev. 11 (1991), and Tom Emerson, a leading civil libertarian who participated in several Hays events over the years, 101 Yale L.J. 317 (1991). The memorial to Tom Emerson is enclosed.

Beyond publications, Norman filled up part of the void from former ACLU activities by joining the board of directors of the Thomas Jefferson Center for the Protection of Free Expression, the Center for National Security Studies, and the Fund for Free Expression. He also helped write an amicus curiae brief in an academic freedom case in the Second Circuit, Levin v. Harlston, in which the court ruled that City University had violated Dr. Levin's rights.

As mentioned earlier, Sylvia was on sabbatical and therefore was active in a wide range of forums outside of as well as in New York City. For example, she taught gender discrimination for five weeks as the Tobias Simon Visiting Scholar at Florida State University in Tallahassee. She also spoke at many law schools, delivering the David C. Baum Lecture at the University of Illinois in Campaign-Urbana and the Earl Warren Lecture at the University of California at San Diego.

In litigation, she served as guardian ad litem on behalf of a six year old child in a case in which a biological mother's lesbian life-partner sought to become an adoptive parent. Sylvia's brief provided the basis for the New York Surrogate's decision granting the adoption. She also helped prepare a brief in this year's Supreme Court abortion case, filed on behalf of 300 American historians, arguing that constitutional protection for abortion choice is consistent with our history and traditions.

Sylvia worked on several law review articles. Former Hays Fellow Rachael Pine (1982-1983) and Sylvia produced a detailed guide for abortion rights advocates working in a world in which we can no longer expect the Supreme Court to protect fundamental liberties. It will be published in a special issue of the Harvard Civil Rights-Civil Liberties Review commemorating Norman Dorsen's tenure as president of the ACLU that will be sent to all Hays Fellows. She also wrote an article analyzing and rejecting various proposals for compromising principle on the divisive abortion



issue.

Sylvia continued her work on a biography of Crystal Eastman, one of the founders of the ACLU. She completed an article on Eastman's career at NYU Law School, her contribution to the creation of workers compensation, and her early efforts for an equal rights amendment to the Constitution.

In January, Sylvia began a two year term as president of the Society of American Law Teachers. In March she attended the SALT sponsored Robert Cover Public Interest Law Conference in Peterboro, New Hampshire, with current Fellows Sarah Ludwig and Katie Watson.

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