

ARTHUR GARFIELD HAYS CIVIL LIBERTIES PROGRAM
ANNUAL REPORT 1993-1994

This year the Fellows worked with the major organizations of the public interest community, including the ACLU, the NAACP Legal Defense and Education Fund, the NYCLU, the NOW Legal Defense and Education Fund, and the Center for Reproductive Law and Policy. The Fellows' work centered on issues of education, health care reform, and sexual harassment. In addition, Fellows worked on welfare reform, community economic development, voting rights, prison conditions, reproductive freedom, and the rights of gay parents.

The 1993-1994 Hays Fellows were Diane Curtis (Robert Marshall Fellow), Maddy deLone (Robert Marshall Fellow), Amybeth Garcia-Bokor (Palmer Weber Fellow), Cory L. Greenberg (Reed Foundation Fellow), Lauren Robinson (Palmer Weber Fellow) and Sandra Widlan (Harriet Pilpel-Planned Parenthood Fellow). For the second time in the Program's history, all the Fellows were female (there were several years when they were all male). A detailed description of the year's work follows.

35th Reunion.

The Hays Program celebrated its 35th anniversary with a program on October 16, 1993. As part of the day's events, we joined forces with the Fund for Free Expression (a unit of Human Rights Watch) to bring together an impressive group of former Fellows, and other scholars, lawyers and activists, to debate a series of issues where freedom of expression is said to collide with another constitutional value, equal protection of the laws. The panels addressed three issues.

Abortion clinic protests. During the civil rights and anti-war movements of the 1960s, no one seriously asserted that the occupation of university offices or vandalism at military facilities were protected by the First Amendment. Is there any reason to think differently about blockades and other disruptive activities against abortion clinics? Even so, exactly how should courts draw a line between lawful, vigorous protest and unlawful interference with the exercise of the constitutional right to abortion. A paper by Professor David Cole of Georgetown Law School addressed these issues. Comments were offered by Catherine Albisa of the Center for Reproductive Law and Policy, Professor Sylvia Law, Hays Fellow 1967-68 and co-director of the Hays Program, and Steven Shapiro, legal director of the American Civil Liberties Union.

Hate speech and hate crimes. The First Amendment does not protect a shopkeeper who is sanctioned under a law prohibiting advertisements or signs that women or nonwhites will not be hired or served. But do free speech principles protect a student from

university sanctions, or the criminal law, for racist or sexist speech? Is it relevant that the speech is directed at an individual or group of students? That it occurs in a classroom, dormitory or elsewhere? Ira Glasser, executive director of the ACLU, made the opening statement, followed by comments from Professor Martin Redish of Northwestern Law School, Professor Randy Kennedy of Harvard Law School, and Professor Judith Resnik, Hays Fellow 1974-75, of the University of Southern California Law School.

Workplace harassment. Everyone agrees that the First Amendment does not protect an employer's verbal suggestion that an employee provide sexual favors to obtain a promotion. But is free expression abridged if an employer is penalized for maintaining a sexist or racist working atmosphere, even if no individual harassment occurs? Can personal posters, t-shirts and photographs be considered in making such a determination? Professor Susan Deller Ross, Hays Fellow 1969-70, director of Georgetown Law School's Women's Law and Public Policy Fellowship Program, opened the discussion, followed by Wendy Kaminer of Radcliffe College, Deborah Ellis NYU '82, Legal Director of the NOW Legal Defense Fund, and Professor Anita Cava, Hays Fellow 1977-78, of the University of Miami Business School.

Norman provided a concluding perspective, pointing out that there is genuine confusion among civil libertarians about how to resolve these tensions -- how to strike a balance between apparently competing values, or indeed whether a balance must be struck. Is the Constitution a zero-sum game, or can both free speech and equality principles be honored in the hardest cases?

The gala dinner that concluded the Hays Program's 35th reunion featured an informal talk by Justice Harry Blackmun. Norman introduced Justice Blackmun, highlighting the continuities and changes in his jurisprudence during his 23 years on the Supreme Court. Justice Blackmun recalled the extraordinary career of Arthur Garfield Hays, a founder of the ACLU and its general counsel for many years, and reminisced about the personalities and leading cases, including Roe v. Wade, that he encountered during his years on the Court. Norman also organized a tribute to Sylvia. The Arthur Garfield Hays Gospel Singers, led by Lynn Paltrow, Hays Fellow 1982-83, sang "We All Need Sylvia to Lean On." If you would like a copy of the lyrics or the video of this extraordinary performance, just ask.

Program Administration

We continued our program of informal evenings at which former Fellows meet with the current Fellows to discuss their backgrounds, aspirations, successes and disappointments in civil liberties work. Joseph Moniz, Hays Fellow 1974-75, told us of his life as a partner at Day, Berry & Howard in Hartford

Connecticut. He is one of the few African Americans in a senior position at a major law firm in the state. Joe has also developed close ties with his ancestral home, Cape Verde, a small island off West Africa. He has traveled there, as a guest of the newly elected government, helping to revamp their judicial system.

Norman prepared a new edition of the Hays brochure, which is enclosed. We instituted a new mechanism by which the Fellows can provide regular feed-back on the strengths and weaknesses of their placements, as well as other aspects of the program. These evaluations will be held in confidence and made available only for the use of future Fellows.

We were assisted in selecting the Fellows for next year by Edward Copeland, 1977-78, and Steve Polan, 1975-1976. The group of applicants was unusually strong. After much consideration we selected the following people for 1994-95. Elizabeth Baker, Rebecca Epstein, Sinsi Mercedes A. Hernandez-Cancio, Joshua Konecky, Raymond Ku, and Jenny Roberts.

The Work of the Fellows

As usual, the heart of the program is the work that the Fellows did with civil rights and civil liberties organizations, much of which we all discussed in the monthly seminar followed by dinner meetings that are an established feature of the Program.

Education

In the spring semester Lauren Robinson worked at the ACLU under the supervision of Helen Hershkoff. Her work supported the arguments asserted in the amicus brief for the ACLU in support of the plaintiffs in Campaign for Fiscal Equity, Inc. ("CFE") v. New York. Plaintiffs and the ACLU argue that the state legislature's inequitable allocation of funds to New York City schools violates the plaintiffs rights under the anti-discrimination clause and that educational opportunity is a "civil right" under the clause. The plaintiffs seek equity in the allocation of funding, that is, educational aid for each student in New York City to enable him or her to receive an adequate education pursuant to the standards in the state constitution. Equity in funding, as opposed to equal funding, recognizes that differences in educational need may require that some districts receive more funding than others.

Lauren's research revealed that the anti-discrimination clause intended to prohibit discrimination by private entities and protect black people and immigrants and integrate them into the political and economic mainstream.

Sandy Widlan worked on educational issues in a First

Amendment context in the spring semester, with the ACLU Arts Censorship Project, under the supervision of Marjorie Heins. The client was a former librarian's aide at a small rural junior high school in Montana. Two seventh grade students, who were doing a school report on "Witchcraft in the Middle Ages", asked her for help with their research. The librarian's aide asked the students if their teacher and parents approved the topic, and they answered in the affirmative. The only resource in the school library referring to this topic was an encyclopedia. The librarian's aid asked the students if they wanted her to check her personal library; they said yes, and she brought them two books from her home. The next day, one of the student's parents arrived at school, calling the books "satanic" and "feminist". As a result, the librarian's aide was fired. Sandy researched and wrote memoranda on First Amendment rights, and the possibility of suing the school district under 42 U.S.C § 1983.

Health Care

In the fall, Diane Curtis worked at the ACLU Legal Department, under the supervision of Helen Hershkoff, analyzing the civil liberties and civil rights issues implicated by President Clinton's Health Security Act. Health care reform, regardless of the specific form it actually ends up taking, will change many of the existing relationships of doctors to patients, insurance companies to doctors and patients, and all parties with the government and any new quasi-governmental entities such as the proposed health care alliances. Most importantly, President Clinton's plan would create a new federal right to health care services. Diane analyzed the plan to identify issues that various projects of the ACLU should address in their more detailed appraisal of the proposal. These issues included access to a fair and effective review process for claims disputes; privacy issues implicated by the development of a universal health care data bank; coverage for women's health services, including abortion and contraception; and the proposed exclusion of undocumented aliens from the plan.

In the spring semester, Diane continued her work on health care with Sylvia, who helped both the Society of American Law Teachers (SALT) and the Bar Association of the City of New York develop positions on health care reform. Diane researched significant aspects of testimony that Professor Rand Rosenblatt, on behalf of SALT, gave to a Congressional subcommittee on needed procedural protections for health care reform, and assisted both professors in writing an editorial for the New England Journal of Medicine on the need for administrative and judicial review of the health benefits claims process. Such protections are essential to make the promised "right that can never be taken away" a reality.

Diane also researched inequities in the health care provided

to racial and ethnic minorities in support of SALT's amicus brief (filed with other concerned organizations) in the Madison-Hughes v. Shalala litigation. This case involves a challenge to HHS's failure to collect data on the race and ethnicity of Medicaid and Medicare participants. While it seems clear that racial minorities receive lesser quality care than white patients, it is almost impossible to make even a prima facie showing of these disparities due to the lack of data.

Sexual Harassment

Cory Greenberg worked on sexual harassment issues for the NOW Legal Defense & Education Fund in the fall semester, under the supervision of Ruth Jones. She researched issues for a case involving sexual harassment in secondary education, including the confidentiality of intraschool proceedings and investigations concerning alleged harassers. Cory also drafted comments responding to the EEOC proposed harassment guidelines, analyzing the intersection of race and gender in harassment claims. Cory also wrote an amicus letter on behalf of NOW LDEF for a case in California involving an adult incest survivor.

In the spring Amybeth Garcia-Bokor, working with the private civil rights firm of Elizabeth Koob and Joan Magoolaghan, was immersed in civil rights litigation practice on the state and federal level. She drafted an argument opposing certiorari from a favorable decision in Columbia University v. Karibian, 14 F.3d 773 (2d Cir. 1994). She also obtained litigation experience in a variety of civil rights cases ranging from prisoner's rights to sex-discriminatory hiring to discrimination in employer-provided disability benefits.

Welfare

Amybeth Garcia-Bokor worked at the NOW Legal Defense Fund in the fall, under the supervision of Martha Davis, addressing women's policy issues in welfare law. She researched the legislative history of human experimentation laws in the context of litigation contesting the legislation passed in New Jersey that limits the size of families eligible for Aid to Families with Dependent Children benefits to the size of the family when it first applied for benefits. This research developed the argument that uniform, untested changes to the welfare laws, such as those enacted by New Jersey, contravene federal regulations that deem programs designed to alter the number of people on welfare "human experimentation" and prohibit such experimentation on women and fetuses without strict HHS scrutiny and approval.

Community Economic Development

Lauren Robinson worked for the Lawyers Alliance for New York Community Development Legal Assistance Center (CDLAC) in the fall

semester, under the supervision of Karen Sherman. Her work involved assessing the current landscape of the community economic development world and the strategies available to CDLAC's clients in engaging in community development. She closely tracked the Community Development Banking and Financial Institutions ("CDFI") Act of 1993, President Clinton's community development bill, which seeks to address the need for capital and technical assistance for business and affordable housing in low and moderate income urban, rural, and Native American communities by providing matching grants to community development financial institutions.

Lauren also researched bills on tax credits on investments in not-for-profit housing companies that were not enacted. The bills sought to amend the private housing finance law and the tax law by providing tax credits to businesses for contributions made to not-for-profit companies. Her work also involved determining the status of various federal and state funding sources available to fund community development work. A plethora of funding programs were initiated in the 1960's and now only a few remain. Finally, she researched and analyzed the characteristics of local development corporations ("LDCs") under New York State law to assess the benefits of incorporating as LDCs rather than acting as a not-for-profit corporation to engage in community economic development.

Voting Rights

In the spring, Cory Greenberg worked at the New York Civil Liberties Union, under the supervision of Art Eisenberg. She coordinated the proceedings of the New York State Task Force on Voter Registration. Cory took part in the Task Force meetings and organized and attended the public hearings. After fact-finding was complete, Cory drafted and revised the Task Force's recommendations and report for Governor Cuomo.

Prison Conditions

Maddy deLone worked for the Legal Aid Society's Prisoner's Rights Project in the fall, under the supervision of Dori Lewis. In Estelle v. Gamble 429 U.S. 97 (1976), the Supreme Court held that deliberate indifference to prisoner's serious illness or injury constituted cruel and unusual punishment under the Eighth Amendment. A series of lower federal court decisions since that time have clarified what must be provided in terms of health services to prisoners and what cannot be done to them.

Maddy worked with the Prisoner's Rights Project of the Legal Aid Society to develop the factual basis for a law suit on behalf of women incarcerated in the City jails. By reviewing statistical reports and medical records and interviewing women and staff in the jails, the Project established that some mental health and medical care services fell below acceptable standards.

As a result of the data gathering and presentation Maddy prepared, City officials and plaintiffs' counsel are negotiating changes in the women's health services to avoid litigation.

Reproductive Freedom

In the Fall semester, Sandy Widlan worked with the Center for Reproductive Law and Policy, under the supervision of Lenora Lapidus and Eve Gardner, writing a long memorandum for a brief challenging a Mississippi statute regulating abortion. In many respects, the Mississippi statute mirrored the Pennsylvania Abortion Control Act upheld by the United States Supreme Court in Casey v. Reproductive Health Services. Like the Pennsylvania Abortion Control Act, the Mississippi statute included an informed consent provision and a 24-hour waiting period. The Center argued that the Mississippi Constitution recognized broader privacy rights than the federal Constitution, and that this statute violated the Mississippi Constitution.

Rights of Gay Parents

In the spring semester, Maddy deLone worked with the Lambda Legal Defense and Educational Fund under the supervision of Beatrice Dohrn. Gay parents routinely face discrimination as they attempt to negotiate for custody or adoption of children. In the Matter of Wolfgang and Byron, a New York Family Court Judge denied a gay man the right to adopt two boys who had thrived as foster children in his home for more than two years. The father also lived with his male partner. In denying the petition for adoption, which had been supported by the social services agency that had overseen the foster care placement, the court held that single people could not be adoptive parents unless there was either a special needs child or no adoptive couples to be found. The court also ruled that the father's partner could not be recognized as a parent since New York State law permits adoption only by married couples or single people.

Maddy researched and wrote an amicus brief for the appellant father that was submitted to the Third Department. The brief asserted that the lower court judge had misapplied the law, established a test that discriminatorily and arbitrarily burdened adoptions by gay adoptive parents in violation of State policy and incorrectly refused to recognize the possibility of second parent adoptions in this State. The brief also provided Lambda with an opportunity to update its materials in support of the fact that gay men and lesbians make good parents.

The Fellows after Graduation

Next year, the Follows will be working with the following organizations and people. Diane L Curtis will be at the Center for Reproductive Law and Policy in New York. Maddy deLone is

clerking for federal judge Robert W. Sweet, of the Southern District of New York. Amybeth Barcia-Bokor will be a fellow at the Georgetown Women's Law and Public Policy Program. Cory L. Greenberg will work in the Criminal Appeals Bureau of the Legal Aid Society in New York. Lauren G. Robinson is clerking for Clifford Scott Green in the Eastern District of Pennsylvania, and Sandy E. Widlan will clerk for Barbara Durham of the Washington Supreme Court.

The Directors

Norman Dorsen continued his service with several public interest organizations, including the Thomas Jefferson Center for the Protection of Free Expression, Planned Parenthood International (Western Hemisphere Division), Human Rights Watch's Fund for Free Expression, several committees of the ACLU, and the Lawyers Committee for Human Rights. In May he led a delegation of the Lawyers Committee to Egypt to investigate the death in police custody of a leading Islamist lawyer.

Norman spent much time this year on projects at NYU Law School. In the fall he produced a report, unanimously adopted by the faculty, that establishes a new and more rigorous system for appointment and review of adjunct faculty at the school. He then chaired the committees that implemented the plan. Later in the year he served on and drafted the report of the committee of chaired professors (he is Stokes Professor) that designated 14 tenured professors, including Sylvia, to new chairs -- the highest academic status in the law school.

Finally, Norman was chair of the committee on the global law program, a major effort to bring to NYU top faculty and graduate students from countries throughout the world. The faculty approved the committee's recommendations on the student portion of the program in April, and the faculty part of the global law program will be submitted for approval in September. Norman has agreed to serve as the first director of the global law program until September 1, 1995, although he will continue as co-director of the Hays Program during this period.

At the annual meeting of the Association of American Law Schools in January 1994, the Society of American Law Teachers on its 20th anniversary presented Norman with its annual Achievement Award for contributions to legal education. Norman was the first president of the Society 1973-1975.

Sylvia A. Law was one of seven people recommended in the fall 1993 for appointment as a Judge on the New York Court of Appeals. Fortunately for the Hays Program, the Governor did not appoint her.

Sylvia finished her term as President of the Society of American Law Teachers. In that capacity she helped to organize a teaching conference at Santa Clara Law School at which almost 300 law professors discussed means of integrating issues of race, gender, and homophobia into the mainstream of the law school curriculum. Another version of this successful conference will be held in Minnesota in October 1994. Sylvia is also an active member of the boards of the Center for Reproductive Law and Policy and New York's Interest on Lawyer's Trust Account program.

Sylvia gave several major addresses. At the 1993 ABA Convention, she helped to organize a program asking "Is the Law Male," and she gave a presentation on Family Law with Patricia Hennessey, Hays Fellow 1978-79. Their talk is published in 69 Chicago-Kent L. Rev. 401 (1994). At the annual meeting of the American Association of Law Schools, Sylvia spoke to the plenary session on the mission of legal education. She gave the annual Charles H. Miller lecture in Professional Responsibility at Tennessee Law School, honoring one of the founders of legal services. Her talk, on health care reform, will be published in the Tennessee Law Review. She joined Justice Sandra Day O'Connor and Chief Judge Judith Kaye as part of Valparaiso's Seegers Program, honoring 100 years of women at that law school. Her talk, on Crystal Eastman's work for feminism, civil liberties and peace, will be published.

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