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School of Law
Arthur Garfield Hays Civil Liberties Program

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ARTHUR GARFIELD HAYS CIVIL LIBERTIES PROGRAM ANNUAL REPORT 1994-1995

The highlight of the year was the announcement of an endowment of over \$200,000 for the new Tom Stoddard Civil Liberties Fellowship, the first fellowship anywhere to focus on civil liberties work on behalf of gay and lesbian people. Tom Stoddard, Hays Fellow 1976-1977, has had an extraordinary career as a lawyer at the New York Civil Liberties Union, as director of the LAMBDA Legal Defense and Education Fund, and as a gifted teacher at NYU Law School.

The gala event to celebrate the new fellowship was held on February 21, 1995. Jenny Pizer, Hays Fellow 1986-1987, and Jay Brown, Hays Fellow 1991-1992, among others, gave moving tributes to Tom and he responded with characteristic humor and charm. Scores of friends of Tom and the Hays Program contributed to the endowment, which was greatly aided by a matching grant of \$100,000 from the Joyce Mertz-Gilmore Foundation. Many people assisted in the work to establish the Fellowship, notably John Silberman of the firm of Paul, Weiss, Rifkind, Wharton & Garrison, and Curt Crossley of the Law School's development staff, now director of the School's Pro Bono American program.

The 1994-1995 Hays Fellows were Elizabeth Baker (Palmer Weber Fellow), Sinsi Mercedes A. Hernandez Cancio (Harriet Pilpel-Planned Parenthood Fellow), Rebecca Epstein (Robert Marshall Fellow), Joshua Konecky (Roger Baldwin Fellow), Raymond Ku (Reed Foundation Fellow), and Jenny Roberts (Reed Foundation Fellow).

The Fellows worked with many forceful advocates for civil liberties in New York whose names are noted below where the Fellows' work is detailed. The Hays Program is deeply grateful to these civil libertarians for their important contribution to the Program.

We continued our series of informal evenings at which former Fellows meet with the current Fellows to discuss their backgrounds, aspirations, successes and disappointments in civil

liberties work. Ronnie Pollack, Hays Fellow 1967-1968, described his work as the head of Families USA, a highly respected advocacy organizations for poor and elderly people. Previously, Ronnie served as the Dean of Antioch Law School and as the founding director of the Food Research Action Center, the advocacy group primarily responsible for creation of the food stamp program. Ronnie talked about escaping the pressures of his political work during the annual camping trips he takes in challenging locations around the world with his wife Becky and their three children.

A new feature in the Program this year was an informal evening discussion with leaders of the Review of Law and Social Change, in which we explored issues confronting the Review, the Hays Program, and the Law School, as well as topics of civil rights and civil liberties.

In 1995-1996, the Hays Program will enjoy the participation of two new faculty members. A new fulltime member of the faculty, Helen Hershkoff, formerly associate legal director of the ACLU, will join our monthly meetings, and David Cole, who will visit NYU from Georgetown Law School in the spring semester, will be acting co-director with Norman while Sylvia visits at the Stanford Law School.

The Fellows selected for 1995-1996 are Sean J. Bolser (Robert Marshall Fellow), James Eichner (Reed Foundation Fellow), Jenny Huang (Palmer Weber Fellow), Stevenson O. Munro (Tom Stoddard Fellow), Sarita Ordonez (Roger Baldwin Fellow), and Rebecca B. Rosenfeld (Harriet Pilpel-Planned Parenthood Fellow). We were greatly assisted in interviewing and selecting these Fellows by Helen Hershkoff and Gemma Solimene, Hays Fellow 1986-1987.

The Work of the Fellows

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

The Fellows' work centered on issues of racial discrimination, First Amendment, discrimination against people with HIV and other disabilities, reproductive freedom, immigrants rights, housing, workers rights, and domestic violence.

Racial discrimination

Sinsi Hernandez-Cancio worked with Alan Jenkins at the NAACP Legal Defense and Education Fund's Poverty and Justice Project, developing a case against the Suffolk County Police Department for discriminatory law enforcement in minority neighborhoods. She researched the admissibility of survey evidence in civil

rights litigation to show differential police responses based on race and compiled demographic information to be used in the design of surveys.

In the spring semester, Sinsi worked with Nina Perales at the Puerto Rican Legal Defense and Education Fund's Latina Rights Initiative to develop legal strategies to address the special problems of Latina women who are victims of domestic violence. She gathered information on incidents of discrimination against non-English speaking Latinas who seek shelter services and explored what legal remedies might be used to change these practices.

Rebecca Epstein worked with George Kendall at the NAACP Legal Defense and Educational Fund, writing an amicus brief to the Supreme Court in support of a petition to grant certiorari on behalf of an African American who was sentenced to death for killing two white women. The main issue on appeal was the prohibition of race-based exercise of peremptory challenges. She researched the claim that African American criminal defendants should be able to exercise peremptory challenges to exclude white potential jurors. Writing the memorandum involved close analysis of the Batson and McCullum cases and their progeny, which reveal a tension between requiring colorblind peremptory challenges and obeying the Fourteenth Amendment's mandate to eradicate discrimination against people of color.

First Amendment.

Raymond Ku worked with Art Eisenberg, legal director of the NYCLU. He researched and drafted a brief in support of a motion for summary judgment in Goldstein v. Manhattan Cable Television. The case involves a First Amendment challenge to a private cable company's censoring of leased access programming without a judicial determination of obscenity according to the established standards of Freedman v. Maryland. Manhattan Cable Television pre-screens and censors programs submitted for transmission on leased access channels. These channels were mandated by Congress to ensure access to the cable medium for a broad diversity of public and commercial speech. Cable operators were originally prohibited from exercising editorial control over public and leased access channels. But in 1992, Congress passed the Helms' Amendment, which required cable operators to censor or segregate "indecent" programming. The Goldstein suit involved novel and difficult issues of state action and statutory interpretation.

Discrimination against people with HIV and other disabilities.

Rebecca Epstein worked for Cary LaCheen at the New York Lawyers for the Public Interest, an organization that specializes in representing people with disabilities. She researched and wrote a memorandum on the rights of deaf people to have sign

language interpreters, focusing principally on the Court Interpreters Act and local human rights laws. Her main project was developing a series of complaints pursuant to the ADA, filed with the Department of Justice. The complaints challenged the inaccessibility of New York City courts to people with disabilities, in violation of Title II of the ADA. The project began with empirical research on the structure of the New York City court system. Rebecca then wrote a series of letters to administrative judges, requesting information pursuant to the Freedom of Information Law concerning the evaluation and transition plans that are required by the ADA. Finally, Rebecca drafted the complaints.

Jenny Roberts worked at the HIV Law Project, which is run by Theresa McGovern. She sought direct services work, and was assigned several clients to represent in Social Security cases and welfare fair hearings. She interviewed clients about their cases and helped them with legal and medical matters by writing letters or making phone calls. In one Social Security case, Jenny gathered medical records and other relevant evidence for a disability case, represented him at the hearing before an Administrative Law Judge, and then submitted closing statements and further medical reports. She also did research on a custody issue for a pending Family Court case.

Reproductive freedom

Jenny Roberts also worked at the Center for Reproductive Law & Policy under the supervision of Eve Gartner. In 1980, the U.S. Supreme Court, in Harris v. McRae, upheld the constitutionality of the Hyde Amendment's restriction on the use of federal Medicaid funds for abortion to cases where the life of the woman is endangered or in cases of rape or incest. After this decision, reproductive rights advocates filed a number of lawsuits challenging state Medicaid restrictions on abortion funding on ~~state~~ constitutional grounds. These suits have been extremely successful, with restrictions held invalid in 9 of 11 cases. The Center was interested in bringing a suit in Georgia, and Jenny began by doing research to determine the strengths and weaknesses of bringing a state constitutional challenge to the Georgia Medicaid abortion funding scheme. After she reported on the current composition of the Georgia Supreme Court and recent state constitutional decisions, it was decided that she should instead focus on Tennessee, a state with some good recent privacy and equal protection decisions, an active Supreme Court and, in 1993, 259,123 female Medicaid recipients between the ages of 15 and 44. Tennessee permits state Medicaid funding for abortions only when the life of the woman is endangered, or in cases of rape and incest. Jenny did extensive research on the Tennessee Medicaid scheme and drafted a summary judgment motion for future use (the lawsuit has yet to be filed).

Immigrants rights

Elizabeth Baker worked on two matters for the ACLU Immigrants' Rights Project under the supervision of Ann Parrent. In the first, she assisted Ann and Mark Risk, Hays Fellow 1983-1984, pro bono counsel from Robinson, Silverman, in preparing a habeas corpus petition on behalf of a young, HIV-positive man who had been detained at Varick Street Detention Center for one year with little hope for either speedy deportation or release. The habeas petition would have challenged the INS's authority to detain indefinitely non-dangerous aliens whom it could not deport -- particularly where there were grounds for medical parole. The petition was not filed, however, because the client was released. In Elizabeth's second project, she assisted Ann in doing preliminary research for a class action challenge to the conditions at Varick Street. Her research focused on possible safeguards against indefinite detention. She examined the procedural due process requirements which have been imposed by courts in the civil commitment context (such as a right to periodic review and the right to counsel) and prepared a memorandum discussing the extent to which these safeguards could be required in INS detentions.

Housing.

Joshua Konecky worked for Chris Hansen and Julie Fernandes at the ACLU national legal department on a major initiative involving mortgage redlining. Until recently, litigation to combat housing discrimination has concentrated primarily on buyers and sellers. But as both national and local community groups have begun to consider challenging discriminatory practices in home lending, the ACLU has begun planning lawsuits against mortgage companies and quasi-governmental corporate lenders in the secondary mortgage market. Josh spent most of the semester researching standing and class certification requirements to determine which people would make the best plaintiffs, what types of classes would be most likely to gain certification, and which circuits would provide the friendliest forums for maintaining a suit to challenge redlining under the Fair Housing Act. Josh also wrote a lengthy memorandum on the structure and possible applications of the Equal Credit Opportunity Act to combat racial discrimination by home mortgage lenders.

During the spring semester, Josh worked on a variety of tenants' rights and related issues at Brooklyn Legal Services, Corporation A. Under the supervision of Richard Wagner, Josh began the term researching the scope of pre-eviction procedural process due to people living in city owned housing. He worked on the appeal of Almonte v. City of New York, a case challenging New York City's practice of unilaterally deciding that occupants of city-owned housing are non-tenants and then forcibly ousting them

without any legal process. The city's refusal to afford occupants due process denies them the opportunity to establish their substantive rights and legal status (e.g. as squatters, licensees or assignees of prior tenants). Josh also began to research the possibility of preventing such forcible and extra-judicial evictions through civil application of the Fourth Amendment. Josh's second major project at Corporation A involved the remand of Lacks v. City of New York, which held that New York City has a statutorily imposed duty to maintain its premises in good repair. Josh's research considered the extent to which the "self-inflicted wound" and "clean hands" doctrines might persuade the trial court to reject arguments of economic hardship by the city when fashioning a remedy for the tenants on remand.

Also under the supervision of Richard Wagner, Josh researched and wrote a motion to dismiss and a reply affirmation on behalf of a 7-A administrator and a tenants association who were being sued in contract for fuel deliveries made to buildings which they did not own. Josh also researched mortgage, landlord-tenant, and various lender liability doctrines to explore the legal obligation of banks to repair buildings on which they hold mortgages. Josh performed this project under the supervision of Hillary Exter. Ms. Exter is currently working with tenants organizations to develop strategies for holding a large bank liable during foreclosure for the legal obligations of debtor-landlords who have abandoned their buildings.

Workers rights.

Elizabeth Baker worked on several matters at the Amalgamated Clothing and Textile Workers (ACTWU) for Dave Prouty, ACTWU's Southern Regional Counsel. She prepared a letter to the NLRB General Counsel appealing a regional director's refusal to file a charge against an employer who unilaterally changed employees' health insurance benefits in violation of §8(a)(5) of the NLRA (a change which left many ACTWU members unable to afford insurance). She also prepared a letter to a NLRB regional office investigating another §8(a)(5) charge filed by ACTWU against an employer who had refused to bargain with the Union to determine whether the employer discriminated against employees active in the union and had tried to condition further bargaining upon the union's waiver of its statutory bargaining rights. She also prepared memoranda discussing possible strategies to stop a plant closing which would leave 50 ACTWU members unemployed and to prevent employers from disciplining or firing workers for off-premises activities unrelated to their employment.

Prisoners Rights

Raymond Ku worked with the private civil rights firm of Elizabeth Koob and Joan Magoolaghan on a series of federal civil rights cases. His primary responsibility was to convince the

United States Attorney for the Western District of New York to bring criminal civil rights charges against "boot camp" prison officials for the murder of an inmate by the facility's guards. He also wrote a brief in support of a motion for contempt against New York City in a wrongful death action under Section 1983. Yglesias v. City of New York. In addition, he provided detailed memoranda of law on the use of expert testimony on rape trauma syndrome in sexual harassment cases under Title VII, Karibian v. Columbia University, and the liability of successor employers and the remedies available against them in HIV discrimination cases. Woodley v. RH Macy, Inc.

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, New York City's Landmarks Conservancy, the ACLU, and especially the Lawyers Committee for Human Rights, where he was recently elected chairman of the executive committee.

In early 1994, Norman chaired the committee that planned the new global law school program, a major effort to bring to NYU top faculty and graduate students from countries throughout the world. The faculty unanimously approved the committee's recommendations and Norman became the first director of the program. At the beginning of 1996, Norman's duties will be assumed by a new director and he will become the chair of the program. Throughout of course he has continued as co-director of the Hays Program.

Norman undertook other projects at the law school. In May 1995 he and Professor Chris Eisgruber convened a national conference on judicial biography that included some of the leading figures in the genre, including Gerald Gunther (biographer of Learned Hand), Richard Posner (Benjamin Cardozo), Mark Tushnet (Thurgood Marshall) and Edward White (Oliver Wendell Holmes and Earl Warren). Sylvia was a participant and moderated one of the conference panels. The conference proceedings will be published in the NYU Law Review. Also to be published in the Review will be the Fall 1994 James Madison Lecture delivered by Judge Betty Fletcher of the Court of Appeals for the Ninth Circuit, in a program that Norman also directs.

During the year Norman published in Constitutional Commentary an article entitled "How American Judges Interpret the Bill of Rights" and a review essay in the Journal of Supreme Court History on a biography of Justice Lewis Powell. The year also saw the publication of the latest ACLU handbook, "The Right to Religious Liberty," by Barry Lynn, Marc D. Stern and Oliver S.

Thomas. Norman is the general editor of the handbook series, which has produced over 50 volumes since its inception in 1970

In July the Secretary of the Treasury appointed Norman as chair of a citizens review panel to monitor and evaluate the Treasury's investigation and report on alleged racist incidents at the Good Ol' Boys Roundup, an annual reunion of Treasury and other law enforcement personnel held in Tennessee.

Sylvia A. Law continued her work as an active member of the boards of the Society of American Law Teachers, 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 American Association of Law Schools Convention in New Orleans, and at the law schools at Drake University in Iowa, University of Pittsburgh and University of Maryland. She published an article, "Silent No More: Physicians' Legal and Ethical Obligations to Patients Seeking Abortions," 21 Rev. of L. and Soc. Change 279 (1995), that describes and supports contemporary movements to encourage medical schools and physicians to do more to make abortion services accessible.

Next year, Elizabeth Baker will continue her work in the labor field with Judith Vladeck's New York City firm. Rebecca Epstein will be clerking for U.S. District Judge Raymond Jackson of the Eastern District in Virginia. Sinsi Hernandez-Cancio will be a fellow at the Georgetown Women's Law and Public Policy Program, working with Susan Ross and Deborah Epstein, Hays Fellows 1969-1970 and 1987-1988, respectively. Joshua Konecky will be clerking for U.S. District Judge Lawrence Karlton in the Eastern District of California. Raymond Ku will be clerking for Judge Timothy K. Lewis of the U.S. Court of Appeals for the Third Circuit.

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. Above all, we are grateful to the scores of former Hays Fellows who have remained in close touch with the Program and assisted us in all possible ways as we continue to build a strong civil liberties community at and beyond Washington Square.