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ARTHUR GARFIELD HAYS CIVIL LIBERTIES PROGRAM
ANNUAL REPORT 1998-1999

This was a busy and productive year for the Hays Program and its Fellows and Directors. The 1998-1999 Hays Fellows were Derek Baxter (Palmer Weber Fellow), Iris Bennett (Leonard Boudin Fellow), Betsy Ginsberg (Harriet Pilpel/Planned Parenthood Fellow), Eric Levin (Robert Marshall Fellow), Munir Pujara (Roger Baldwin Fellow), and Valerie Wright (Tom Stoddard Fellow).

THE WORK OF THE FELLOWS

As usual, the heart of the Hays Program is the work of the Fellows. They again interned with many leading advocates for civil liberties, and we are deeply grateful to all for their contributions to the Program. At our regular meetings, each Fellow and his or her supervising attorneys led a discussion of a current civil liberties case on which they collaborated.

Each year the substantive work of the Hays program is largely driven by the interests of the Fellows. In August, dozens of public interest lawyers submit proposals to induce a Fellow to sign on with them. The demand for committed, talented help in public interest work always outstrips the supply and, sadly, most of those who request help from a Hays Fellow are disappointed.

Our core governing principle is to encourage Fellows to work at the jobs, and with the people and organizations, that they find most attractive. This principle is modified in two important ways. First, we generally insist that Fellows take on two different assignments, one in the fall and one in the spring. We also encourage people to work with organizations and on at least one issue that is new for them. Both of these modifications of the principle of Fellow choice reflect our view that the Hays Fellowship is a special opportunity to be exposed to a range of issues and public interest practice styles.

The work that Fellows do indicates what is most important to each generation of law students committed to civil liberties work. This year's Fellows exhibited a high interest in the problems of immigrants. In addition, Fellows worked on continuing challenges to the death penalty, prisoner's rights, reproductive freedom, discrimination against people with disabilities, gay and lesbian rights, the rights of young people, and community economic development.

IMMIGRANTS RIGHTS

In the fall, 1998, Iris Bennett interned at the ACLU Immigrants Rights Project, where she worked with Judy Rabinovitz, Hays Fellow 1984-85, challenging the constitutionality, on due process grounds, of mandatory detention of immigrants in removal proceedings. Mandatory detention, enacted pursuant to the 1996 Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act, means that immigrants are incarcerated in INS facilities or local prisons and jails throughout removal proceedings without an opportunity for individualized custody hearings to determine if they are a flight risk or danger to the public. Judy and Iris worked closely with local counsel to prepare the briefing for the first challenge to the new law, *Martinez v. Greene*, brought in the District Court for Denver, Colorado. Their work culminated happily: Judge Lewis Babcock held that mandatory detention was unconstitutional and ordered that the petitioners be granted individual custody hearings. Iris reports, "It was an extraordinarily fulfilling experience to be able to participate in this case and see our work realized in a victory."

Derek Baxter spent the spring semester working with two groups in New Paltz, in the Hudson Valley, which represent migrant farm workers in New York State. With the Farm Worker Law Project of the Legal Aid Society of Mid-New York, Derek interviewed farm worker clients and worked on a motion for summary judgment in a case where farm workers received sub-standard housing. He also wrote a legal brief assessing whether a private right of action may be implied under the Immigration and Nationality Act to enforce the "50 Percent Rule." Rarely enforced by the Department of Labor, the 50 Percent Rule is an administrative regulation which provides that domestic farm workers must be hired in certain circumstances when growers seek to use "guest workers", i.e. foreign farm workers who are brought in for a specific growing season and then returned to their country at the end of the season. The guest worker program provides farm workers with few enforceable rights, and tends to depress local wages.

With Farm Worker Legal Services of New York, and a group of migrant farm workers, Derek traveled to Albany to lobby New York State Senators on farm worker issues, urging them to support an increase in the minimum wage for farm workers, a voluntary day of rest in the workweek, and stricter controls on pesticide use in the fields. He also participated in training sessions designed to work with farm workers on how to best tell their stories to legislators.

In fall 1998, Munir Pujara worked with Manny Vargas of the Criminal Defense Immigration Project. He helped in test case litigation, monitoring cases and researching legal claims for relief for individuals in deportation and removal proceedings resulting from criminal convictions. He

researched and developed a claim of equitable estoppel for cases in which the INS did not take action against immigrants until after the Immigration Reform Act was adopted and those individuals were no longer eligible for discretionary relief. He prepared a model brief outlining this legal argument.

In the spring 1999, Iris Bennett continued her internship at the ACLU Immigrants Rights Workshop with Judy Rabinovitz. She worked primarily on research in preparation for bringing a procedural due process challenge to a new regulation promulgated by the INS pursuant to which the INS may invoke an "automatic stay" of an immigration judge's decision to release an alien from detention. This provision allows the INS in certain circumstances unilaterally to stay an alien's release while it is appealing the underlying immigration judge decision to the Board of Immigration Appeals. Her work included: preparing FOIA requests directed to the Department of Justice and the Executive Office for Immigration Review concerning the INS's use of the automatic stay provision; investigating whether such "automatic stays" exist in other detention contexts, including pre-trial detention, juvenile delinquency detention, civil commitment, and during habeas proceedings; and looking at how both federal and state courts have addressed procedural due process concerns in these other contexts.

Thanks to the Hays Adolph Fund, which supports travel by Fellows related to their work, Iris was able to accompany Judy when she argued *Zadvydas v. Caplinger* before the Fifth Circuit in Austin, Texas. This case concerns the permanent detention of a stateless alien. Mr. Zadvydas has been ordered deported as an "aggravated felon" but no country will accept him. The INS contends it can continue to detain him under these circumstances while the ACLU argues that continued detention with no end in sight violates due process. Iris reports, "This trip was a wonderful opportunity to observe both the preparation process for the argument and the argument itself, as well as to assist with some last-minute research."

DEATH PENALTY

During the fall, Erik Levin worked for Professor Bryan Stevenson representing death row inmates and others convicted of crimes as they appealed their convictions in Alabama state courts as well as the federal courts. He wrote claims, conducted legal research, and prepared social science data to be used in appeal briefs.

PRISONERS' RIGHTS

In the fall 1998, Valerie Wright worked with the private civil rights law firm, Koob & Magoolaghan, on several pending cases, most of which involved inmates of city and state jails who had been killed or severely injured by corrections officers. She researched and wrote a memorandum concerning a lawyers' ability to enter a default judgment and win damages from a deceased defendant. She also prepared a federal complaint for a state prison inmate who was severely beaten by prison guards, asserting that rights to due process and to freedom from cruel and unusual

punishment had been violated. She also helped prepare a summary judgment motion in an employment discrimination case. Valerie worked with Elizabeth Koob and Joan Magoolaghan, as well as Cara Cherry and former Hays Fellow Jenny Huang, 1995-96.

RIGHTS OF PEOPLE WITH DISABILITIES

In the fall semester, Betsy Ginsberg worked with Jennifer Middleton and Matt Coles of the AIDS project of the ACLU. Her work focused on a case filed in the District of Oregon entitled *Doe v. An Oregon Resort*, filed by the ACLU in the summer of 1998. The case was filed on behalf of a ski patroller whose employer, upon learning that his wife had AIDS, required him to take an HIV test as a condition of his continued employment. Because John Doe refused to take the test, he was fired from his position. His claim stated that his employers violated the Americans with Disabilities Act and Oregon anti-discrimination law because they based their adverse employment action against him on the fact that they regarded him as having a disability (HIV) or on his association with a person (his wife) with a disability.

After the Supreme Court's decision in *Bragdon v. Abbott* in June 1998, the AIDS project has been developing strategies to expand the court's ruling such that all people with HIV/AIDS are covered under the Americans with Disabilities Act. Betsy drafted a summary judgment motion that was to be brought before much discovery was completed. After many discussions about which arguments the brief should contain and drafts of the various arguments, the motion simply asked the court to rule on the Supreme Court's reasoning in *Bragdon*, meant that HIV always should be regarded as a disability. She also did some work on discovery.

REPRODUCTIVE FREEDOM

In the spring semester Betsy Ginsberg worked with Janet Crepps at the Center for Reproductive Law and Policy on research involving conscience clauses in state and federal managed care statutes. Conscience clauses, allowing health care providers to opt out of providing certain services based on moral or religious beliefs, have been seen traditionally in the areas of abortion and contraception. Recently, conscience clauses have been appearing in managed care statutes, allowing HMOs, individual providers, and employers to opt out of providing any health care services, and even counseling and referrals based on conscience and/or religion. Betsy's research focused on the Medicaid and Medicare plus Choice managed care conscience clauses and the rules proposed by the Health Care Financing Administration, and the statutes of four states (Illinois, North Dakota, Texas and Washington) which have adopted similar conscience clauses.

GAY AND LESBIAN RIGHTS

In the spring 1999, Valerie Wright worked with Michael Adams of the ACLU Lesbian &

Gay Rights Project to study the use of expert witnesses in litigation involving gay and lesbian parental rights. The ACLU has come up against "experts" who have attempted to use social science to support claims that gays and lesbians are not fit to parent, and that children raised in a non-heterosexual household are harmed socially and psychologically. The ACLU has found that such evidence, if it is admitted, can present a serious obstacle to establishing the rights of gays and lesbians with respect to adoption and custody issues. Valerie researched the law concerning the admissibility of expert witness testimony and opinion to develop strategies for excluding such evidence or for attacking it when it cannot be kept out of court.

RIGHTS OF YOUNG PEOPLE

In the spring, Erik Levin worked with Elsie Chandler, a professor at CUNY John Jay, to start the Juvenile Defender Resource Center, an organization dedicated to the representation of juveniles charged with offenses in adult criminal and family court. Elsie, a trained psychoanalyst and criminal defense lawyer, conceived the Center as a place where both direct representation and scholarly research on juvenile crime will be conducted. The Center will eventually employ several lawyers, social workers and support staff and will serve as a back-up center to others who represent juveniles, train lawyers representing juveniles, and conduct scholarly research. The Center will also engage in impact litigation addressing the constitutionality of the conditions of juvenile confinement and as well as pre-trial procedures. In his internship, Erik assisted in the gathering of social science research and other research to be used in the grant proposals for the Center.

Munir Pujara worked with Advocates for Children in the spring of 1999, assisting in the development of New York City regulations to clarify the disciplinary standards for students accused of sexually harassing other students. Some school personnel have overreacted out of a fear of liability and suspended students without providing due process. At the same time, students subject to peer harassment sometimes have not been adequately protected or counseled. Advocates for Children has developed guidelines to address the interests of all students. Munir researched federal standards on sexual harassment and the applicability of rules defined in the adult employment context to situations involving children in schools. In addition, he surveyed other areas of the country to determine what other approaches have been adopted.

COMMUNITY ECONOMIC DEVELOPMENT

Derek Baxter spent the fall working with the Community Economic Development (CED) Project of Brooklyn Legal Services Corporation-A, under the supervision of Brian Glick. The CED team represents a number of non-profit clients in several low-income areas of Brooklyn. Derek worked with a new non-profit, the Central Brooklyn Neighborhood Economic Center (CBNEC), which provides employment services in a low-income neighborhood in Bedford-Stuyvesant. After consulting with the Executive Director of the group as to CBNEC's needs and goals, Derek amended the articles of incorporation, drafted the by-laws, and filed for non-profit tax status for the group.

He also researched several housing development issues for the CUD unit.

THE DIRECTORS

Norman Dorsen continued his service with several public interest organizations, primarily the Lawyers Committee for Human Rights, where he chairs the board of directors. Among Norman's other active affiliations are as trustee of the Thomas Jefferson Center for the Protection of Free Expression, and as co-chair of the Emergency Committee to Defend the First Amendment, which was formed in 1989 to oppose the proposed constitutional amendment to permit punishment of flag desecration. He continued as the first president of the U.S. Association of Constitutional Law, and was elected to the executive committee of the International Association of Constitutional Law. His travels for these groups last year took him to England, Italy and The Netherlands.

As previously reported, Norman chaired the committee that planned NYU's Global Law School Program. After the program was approved, he directed it until early 1996, when he became faculty chair while continuing to head the committee that recommends foreign law professors to the faculty. The Global Law Program has developed new initiatives, including the introduction of global issues into one class of each first year JD section and projects on transitional justice and global public interest law. Norman also continued to direct the James Madison lecture series in which federal appellate judges address a constitutional law topic; last year's lecturer was Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit, who spoke movingly on the death penalty. The lecturer this fall will be Judge Martha Daughtrey of the U.S. Court of Appeals for the Sixth Circuit.

Norman's scholarly output has diminished in recent years under the weight of administrative duties, first with the ACLU and now with the Global Law School Program and the Lawyers Committee for Human Rights. Last year he published, with Jerry Fowler, *The International Criminal Court: An Important Step Toward Effective International Justice*, ACLU International Civil Liberties Report, May 1999, pp: 1-8, and a series of biographical essays that appeared in *American National Biography* (24 vols. 1999) on Roger Baldwin, Hugo Black, Zechariah Chafee, Albert deSilver, John Marshall Harlan II, Arthur Garfield Hays and Calvert Magruder. The Black and Hays articles were co-authored with Professor Sarah Barringer Gordon of Pennsylvania Law School.

Sylvia A. Law also had a busy year. She has continued to work with advocates at state and federal level who seek to expand insurance coverage for contraception, enjoying victories in several states. In 1999, legislators in North Carolina, Vermont, Georgia, Connecticut, Maine, Hawaii, Nevada and New Hampshire required that insurance policies that cover prescription drugs must also cover contraception. See Carey Goldberg, *Insurance for Viagra Spurs Coverage for Birth Control*, N.Y. Times, June 30, 1999, A-1. While the development and rapid insurance coverage of viagra was certainly a boon to the advocates seeking coverage for birth control, it was also significant that reproductive freedom advocates were poised for this campaign.

In January, at the AALS Conference in New Orleans, Sylvia helped to organize a demonstration protesting local judicial rules that limit the ability of law school clinics to represent low income people, and served as Chair of the Section on Law and Community, presenting a program on racial discrimination in financing for housing. In January she delivered the Mansfield Lecture at the University of Akron Law School on White Privilege and Affirmative Action was published at 32 Akron L. Rev. 603 (1999). Reprints are available to Hays Fellows on request. In March Sylvia joined 18 NYU Law Students, including Hays Fellow Derek Baxter, on a trip to Cuba to study its legal system. Fortuitously, the trip coincided with the Baltimore/Cuba baseball game and the Bridges Concert. She has continue to work with Compassion in Dying, as a Board member and legal advisor, seeking to promote better pain relief and patient control over death. She continued her work as a Trustee of New York's Interest on Lawyer's Trust Account (IOLA) until February when Governor Pataki noted that she was a hold-over Cuomo appointee and asked her to step aside. She is writing a law review article, or perhaps a book, on commercial sex. It argues that current U.S. policy is irrational and damaging to women. Finally, Sylvia helped to prepare supplements to her casebook, Law and the American Health Care System (Foundation Press, 1997), in January and again in June.

ADMINISTRATION

At the urging of several Fellows, we explored the possibility of providing a supplemental, post-graduation, grant to Fellows who are entering public interest work. In the first year of attempting to implement such a program, we learned that it is very difficult to administer. Do federal clerkships count as public interest? Should we provide such grants to Fellows who do not yet have a job? For the time being we have abandoned the concept of post-graduation stipends, with one important exception. Beginning this year, the Hays Program will pay a large part of the cost of bar review courses for Fellows going into public interest work who would otherwise have to pay those fees themselves, just as many commercial law firms pay bar review fees for new associates.

We received interviewing help and wise judgment in selecting the 1999-2000 Fellows from Emily J. Sack, Hays Fellow 1990-1991, Coordinator of Legal Policy at the Center for Court Innovation, and Kim Hawkins, Hays Fellow 1992-93, an instructor in NYU's Lawyering Program. In the full semester, Stefan Presser, Hays Fellow 1978-1979, legal director of the ACLU of Pennsylvania, and in the spring semester, Sana F. Shtasel, Hays Fellow 1975-76, executive director of Planned Parenthood of Maryland, and now head of the Washington D.C. office of the Center for Reproductive Law and Policy, joined us for discussion of their careers and other activities since their Hays Fellowships.

We are tremendously grateful 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. The big news is that, with substantial aid from former Fellows, we have now endowed the Deborah Rachael Linfield Fellowship for work on freedom of the press. The Program now has seven

Fellowships that are fully funded. Above all, we are grateful to the scores of former Hays Fellows who have remained in close touch about their own lives and work, and in various ways assisted us as we continue to build a strong civil liberties community at and beyond Washington Square.

FUTURE PLANS

Sylvia will be taking a sabbatical in 1999-2000. She is going to Hawaii to study its extraordinary health care financing and delivery system and to Nicaragua to teach women's rights at the University of Nicaragua in Managua. Professor Holly Maguigan will serve as Acting Co-Director with Norman. Since 1987, Holly has been a member of the clinical law faculty at NYU, specializing in criminal defense and focusing on the defense of battered women who fight back.

In September, 1999, Valerie Wright will begin a two-year clerkship with Federal District Judge Joseph A. DiClerico, Jr., in the District of New Hampshire, in Concord, NH. For the next two years, Eric Levin will be clerking for the Honorable Lawrence K. Karlton, of the Eastern District of California. Betsy Ginsberg has a two year NAPIL equal justice fellowship with the Prison Law Office in San Quentin, CA. The focus of her fellowship will be disability rights in California prisons. Beginning in the fall, Munir Pujara will be working for the Legal Aid Society's Criminal Defense Division. Derek Baxter will continue his work with immigrant farm workers, as a staff attorney with the Virginia Farm Workers Legal Assistance Program. And Iris Bennett, after a brief period in a law firm, will begin a clerkship with Judge Robert Sweet, United States District Court in the Southern District of New York.

The Fellows for 1999-2000 are Ilizabetch Gonchar (Linfield Fellow), Sheryl I. Harris (Stoddard Fellow), Vida B. Johnson (Marshall Fellow), Zachary Katznelson (Weber Fellow), Shina Majeed (Baldwin Fellow), Sejal R. Zota (Boudin Fellow).

Norman Dorsen
Sylvia A. Law

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