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ANNUAL REPORT -- 1982

1982 was a productive year for the Arthur Garfield Hays Civil Liberties Program. Admirers of Roger N. Baldwin contributed sufficient funds to endow a permanent Fellowship in the Program to assure that work in civil liberties and international human rights will be continued in his name. In 1982 the first Baldwin Fellow was appointed, joining the Hays Fellows and the Robert Marshall Fellow in work on civil rights and civil liberties cases, as well as other projects.

Most of the Fellows worked at traditional civil rights and civil liberties organizations including the NAACP Legal Defense Fund, Inc., the Women's Rights and Reproductive Freedom Projects of the American Civil Liberties Union, and the Center for Constitutional Rights. One Fellow was associated with a private attorney doing a <u>pro bono</u> civil rights case, and several Fellows worked with the Directors on litigation and scholarly projects.

A depressing amount of the work of the Fellows this year was concentrated in two types of cases: long, complex trials of employment discrimination claims and challenges to restrictions on women's access to abortion. This pattern reflects the increasing stringency of legal standards of proof in discrimination cases, and the priority that the New Right has given to efforts to resurrect "traditional family values" by denying women control of their bodies.

A more detailed description follows.

Employment Discrimination Litigation

Jeremy Travis worked with the ACLU's Women's Rights Project on two cases alleging discrimination in pension programs, Teachers Insurance and Annuity Association v. Spirt, 29 FEP Cases 1599 (2d Cir. 1982) and <u>Peters v. Wayne State University</u>, 29 FEP Cases 1753 (6th Cir. Both cases challenge as discriminatory the practices of pension plans that require male and female participants to make identical contributions, but that pay smaller monthly benefits to female retirees because women as a class live longer than men. Jeremy worked on several highly technical legal issues involving the interrelationship between federal civil rights law, federal pension law, and the McCarran-Ferguson Act, which generally exempts the "business of insurance" from federal regulation. Federal circuit court rulings on these issues are divided and Supreme Court review has been sought in both cases.

Hal Candee worked with the NAACP Legal Defense Fund on an employment discrimination case, Howard v. McLucal, that has been in discovery for over seven years, and is scheduled to go to trial early in 1983. Plaintiffs are black civilian employees at an Air Force base in Georgia who allege discrimination in hiring, promotion, training and discipline. Hal prepared factual material for a notice to admit factual allegations and did legal research on the sanctions available when the government destroys or loses evidence of disparate testing results.

Shailah Stewart continued work on behalf of the black and female plaintiffs in White y. Nassau County Police Department, a Title VII case challenging their employment discrimination practices. More specifically, she helped prepare a response to Bakke claims raised by white male officers seeking to intervene in the suit between blacks and women and the County, and she prepared a challenge to some aspects of a consent decree that was entered into between the Justice Department and Nassau County in their related consolidated case. She reported, "Sadly, that settlement was very much in line with the Reagan/Reynolds approach to Title VII; that is, no affirmative action in hiring, a focus on recruitment that lacks any enforceable obligations with real teeth, and a general resistance to any relief for persons who cannot establish that they

were specifically the victims of discrimination."

Reproductive Freedom Litigation

Hays Director Sylvia Law and Fellows Rachael Pine and Lynn Paltrow helped to prepare the record and to write briefs for the parties and for several amicus organiziations for the Supreme Court in Akron Center for Reproductive Health v. Akron and related abortion rights cases that were heard by the Court in the fall of 1982. These cases challenge a variety of abortion regulations, including a law demanding that doctors provide women "informed consent" by reading them a standard text stating that "a fetus is a human being from the moment of conception" and abortion is "major surgery" that may produce adverse consequences including death; mandatory waiting periods after this "informed consent" and prior to the abortion; requirements that counseling be done personally by physicians rather than by specialized counselors; and requirements that abortions be performed in hospitals after the 12th week of pregnancy, even though in large portions of the country there are no hospitals that allow abortions.

Rachael and Lynn also did extensive work on cases challenging laws that require married women to notify their husbands prior to obtaining an The Supreme Court held in Planned abortion. Parenthood v. Danforth, 428 U.S. 52 (1976), that states may not constitutionally demand that women obtain the consent of their husbands prior to obtaining an abortion. Right tο organizations have had increasing success in persuading legislatures that a notification requirement is different than a consent law, and challenges to these laws are now pending in several states.

Anne Olesen did extensive work gathering data on the operation of a Minnesota program under which a minor who seeks to obtain an abortion without informing both of her parents must go to court and establish either that she is sufficiently mature to make the abortion decision for herself or that it would not be in her best interest to inform both parents. Anne prepared a questionnaire and distributed it to the major abortion providers in Minnesota, requesting information about their experience with the notification/judicial by-pass statute. As the data came back she organized and analyzed it, and requested further information. (Hodgson v. Minnesota).

Anne also helped prepare for the law suit to challenge the regulations proposed by the federal Department of Health and Human Services requiring that organizations receiving funds under Title X notify parents of children receiving contraceptives from federally funded providers. (The regulations were initially proposed early in 1982. HHS received more comments on the proposed rules than on any others that have ever been issued. The regulations were issued in final form early in 1983 and suit was filed immediately.)

Prisoners Rights and Death Penalty Work

Michele E. Chandler worked with the NAACP Legal Defense Fund, Inc. and with Professor Anthony Amsterdam on cases brought on behalf of individuals on death row in Texas and Florida. Green v. Estelle, (5th Cir. 1982) and Barclay v. Florida, (Fla. Sup. Ct. 1982). Both cases challenged the constitutionality of various aspects of the trial in which the petitioners had been found guilty of capital crimes. Michele also worked, at the NAACP Legal Defense Fund, on a case challenging conditions of confinement on behalf of the inmates of the Saginaw County Jail.

Other work

The Fellows worked on a variety of publications. Sherryl E. Michaelson did extensive research and writing on the historical background of civil liberties, beginning with the Babylonians and Summerians circa 3,000 B.C. in preparation for an article planned by Norman Dorsen on the history and philosophy of civil liberties. She also did research, rewriting and editing of the Chapter on "Gays and the Military" under supervision of former Fellow Tom Stoddard for the revised edition of the ACLU book on the Rights of Gay People. Rachael Pine completed an article entitled "Toward a Meaningful Right to Counsel for Refugees in Exclusion Proceedings," that will appear in the NYU Review of Law and Social Change in the Spring, 1983. Jose Morin did research on current proposal for changes in federal support for the financing of legal education, in conjunction with an effort by Hays Director Sylvia Law to develop alternative financial structures that would lessen the pressure on law school graduates to take high paying work. Bill Bernstein's analysis of state funding of medical education in New York and proposal to use public funds more effectively to increase the number of minority physicians and

doctors working in underserved areas is being published in Yale's <u>Journal of Health Policy</u>, <u>Politics and Law</u>.

The Directors

Norman Dorsen continued as President of the American Civil Liberties Union, a post he has held since 1976. In this position he chairs the Union's Board and Executive Committee, appoints members to all ACLU committees, participates in policy and financial discussions, travels throughout the country to meet with ACLU officials and members, and speaks at public events. In addition in 1982 Professor Dorsen published a number of articles, including one in the Connecticut Law Review on the rising importance of state constitutional law in civil liberties cases. He delivered the George Abel Dreyfous Lecturs on Civil Liberties at Tulane Law School on the topic, "The American Civil Liberties Union: Institutional Analysis." Professor Dorsen also produced a 600 page supplement to the well-known materials on the Legal Process by Henry Hart and Albert Sacks. Finally, he continued his work as constitutional consultant to the Native American Rights Fund in its land claim cases on behalf of three Oneida tribes.

Sylvia A. Law did the work on the Supreme Court abortion cases described above. Her article, "Women, Work, Welfare and the Preservation of Patriarchy," was accepted for publication in the University of Pennsylvania Law Review. This paper was presented as the Mellon Lecture, at the University of Pittsburgh School of Law. With the help of Fellows Rachael Pine and Lynn Paltrow she wrote another article, "Rethinking Sex and the Constitution," that attempts to integrate under standing of doctrines of sex based equality and reproductive freedom. She wrote two articles opposing efforts to shift the costs of physicians malpractice insurance premiums to the general public.

Other Program Activities

The work summarized above is the heart of the Hays Civil Liberties Program. In addition, the Fellows and the Co-Directors meet each month to discuss their work and to explore in depth an issue that an individual Fellow has encountered in his or her work. An experienced civil rights or civil

liberties lawyer is often asked to join us in these discussions to enrich the analysis and to offer the Fellows an opportunity to meet some of the practitioners in the field. Finally, each Sping the Directors and Fellows hold a year-end dinner at which a leading civil libertarian speaks and answers questions. Last year the guest was John Shattuck, Director of the Washington Office of the ACLU, who provided an excellent report on the survival of civil liberties under the Reagan administration.