

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY

NEW BRUNSWICK

AN INTERVIEW WITH NAN HUNTER

FOR THE

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Shaun Illingworth: This begins an interview with Dean Nan Hunter at Georgetown Law School in Washington D.C. on March 20, 2015 with Shaun Illingworth for the ACLU Oral History Project. Thank you very much for having me here today.

Nan Hunter: My pleasure.

SI: To begin, can you tell me where and when you were born?

NH: I was born in Wilmington, North Carolina, which is also where I grew up. I was born in 1949.

SI: Can you tell me a little bit about growing up in Wilmington, what your neighborhood was like?

NH: Well, it was a small town at that point, actually. So I'm laughing a little bit at the term neighborhood because from the perspective of a metropolitan area, the whole town was like a neighborhood. It was a population of about fifty thousand. I guess a small city, large town. Conservative part of a conservative state. I was born in 1949, so I grew up in the 1950s, 1960s. The dominant issue was race and the battle over integration. That's what I remember from my childhood.

SI: Well, how did that play out in your area? You would have been going to school after *Brown v. Board of Education*? [Editor's Note: *Brown v. Board of Education of Topeka, Kansas* was a 1954 Supreme Court ruling that ordered schools to be desegregated.] I understand that was not always enforced in some of these states.

NH: Yes. No, I never went to a racially integrated school until I was in high school. So, more than ten years after *Brown v. Board* was decided. It was the dominant political, social issue in that place. Now, as a small child, I wasn't very much aware of it. I was aware of racial distinctions being drawn though. I was troubled by them from a very young age and had many, many arguments with my mother about race as I became an older child and then went into the teenage years. So it was a tremendously important set of issues for me, personally.

SI: Tell me a little bit about your education in that area where you went to school. What interested you the most in school?

NH: Well, I went to public schools in Wilmington from first grade through graduating from high school. As I said, it was not until high school that I went to a racially integrated school. The things that interested me the most--I loved school. School was just a treat for me, I think for as long as I can remember. The things that interested me the most at the time, in terms of school, were writing, journalism. When I was in high school I wanted to be a journalist. And history has always been an interest. So I was a fairly athletic kid, but growing up--the benefits and pleasures of growing up in a small town were also part of the picture, as well as the fact that this particular town is located on the Atlantic coast. So, for me a huge part of my childhood revolves around going to the beach, swimming and that sort of thing.

SI: Well, I know now it is quite--I wouldn't say touristy, but a lot of people retire down there. Was it that way when you were growing up?

NH: No, the town has just exploded and become so much more cosmopolitan than it was when I was a kid. When I visit there now, it's much larger. What is now a branch of the State University at Wilmington, the UNCW campus has grown--I wouldn't even know--exponentially, I guess, since I was a child. So, of course, that has brought in students [and] faculty. There's a film and TV studio located there. The tourist industry, because of the beaches, it was always a haven for tourists, but that's become much larger and more sophisticated. So, the irony for me, it was not--my experience of it growing up was probably more negative than positive. Now people come up to me and say what a great place it is. It's still pretty conservative, but it's a very different place now than what it was then.

SI: Growing up, were you part of a large family? Did you have a lot of siblings?

NH: One sibling. One younger brother.

SI: Outside of the classroom, what did you do for entertainment or did you work, or anything like that in high school?

NH: In high school, I had part-time jobs, plus standard activities, reading, going to the beach, movies. When I was a younger child, it was girl scouts, playing softball, pretty basic stuff.

SI: So moving forward through the 1960s, you said that your high school was the first integrated school you went to. Were there any issues there? Were there any difficulties?

NH: Not when I was there. It was a very small number of African Americans students who had the guts to integrate the high school. In the late '60s and early '70s, there were significant racial tensions that hit the surface in Wilmington, but by that point I was in college.

SI: How did your family feel about education? Were they pushing you towards college or was that something that was more self-motivated?

NH: No. It was really, pretty much self-motivated. My father was a college graduate. My mother had never gone to college. I don't think my mother ever regretted not having gone to college. It was assumed that my younger brother would go to college. It was certainly, perfectly okay if I went to college, but there was absolutely no--certainly, no academic pressure. Obviously, my parents wanted both of us to do well in school, but the pressure to excel in school just wasn't there, probably to my benefit.

SI: So you would have been in high school from 1967 to 1970?

NH: No, it was more like '65 to '67.

SI: Mostly interview people who are in the northeast growing up. You look at yearbooks from everyone's high school and they start out looking like it is the 1950s and the end it looks like Woodstock. Was the counterculture or the overall trends like that showing up in Wilmington?

NH: Not at the point that I was in high school. I graduated in 1967. Those friends showed up very quickly afterwards. That was a period of a lot of flipping, of the sort, I think, that's reflected in the yearbooks that you just described. I was in high school at what was really the very end of the 1950s. That's how I would characterize how it was in Wilmington. I'm sure it was somewhat different in other places, but yes, it was the very end of the 1950s, I would say. In

the four years that I was in college--I graduated from college in 1971, [it was] just transformational.

SI: In your high school, when things would happen such as the March on Washington and North Carolina was a big state for sit-ins and that sort of thing, were those discussed among your classmates and how were they viewed? [Editor's Note: The March on Washington for Jobs and Freedom was a civil rights march that occurred in Washington D.C. on August 28, 1963. Martin Luther King gave his "I Have a Dream" speech at the march on the steps of the Lincoln Memorial.]

NH: No, they were not much discussed. I have to say, certainly the majority of students were not terribly engaged with those issues. I would say that in my friendship group it was different. There was more discussion. Even with that, it was nothing like the intensity of discussion that I experienced and I'm sure they experienced as well in college, just literally a year or two later. So it was the very, very beginning of anti-war marches and they barely penetrated the consciousness, I would say, down there. I remember doing a high school project on Vietnam--it was putting pins in a map I guess where American soldiers had died or something like that--something very basic. But the conceptualization of it was at least agnostic about supporting the war. It stood out for that, for that perspective. I was not the only kid from that high school who developed a much more radical perspective on things.

SI: You decided to go to Northwestern. How did you choose Northwestern?

NH: Well, as I said, in high school I thought I wanted to be a journalist and Northwestern has an excellent school of journalism. After my junior year, when I was editor of the newspaper--I was editor of the newspaper my senior year, but they have a summer program for high school students in selected areas. One is journalism, one is theater, I guess one is probably engineering. There might be one or two others and it's quite competitive to get into it. So I was selected to go to the program in journalism and it was really my first time away from home on my own. The whole experience was like going to college for four or five weeks in the summer, however long it lasted. I just loved it. I just ate it up. So that was a complete snowjob on me in terms of wanting to go to Northwestern for undergraduate school.

SI: Was it much of a shock going from Wilmington to the Chicago area?

NH: Quite a bit of a shock, yes. I was very oriented to wanting to leave Wilmington and wanting to leave the South. So there wasn't any sort of second-guessing along those lines, but yes, the students were heavily from, I would say, the Northeast and the Midwest. It was just a very different setting, in a way that I really enjoyed for the most part.

SI: Well, what interested you the most on campus? What did you get involved in outside of the classroom?

NH: I got involved in the anti-war politics pretty quickly. I participated in some sit-ins. I remember spending a very, very nervous weekend wondering if I was going to be expelled because some students were expelled from a sit-in of the ROTC building, and I had been part of that as well. It hit me at that point, that actually, I was there heavily, heavily on scholarships, and I really didn't have a plan B if I had been expelled. Luckily, I wasn't. So I would say that

the anti-war activities were the main things that I was involved with on campus during those years.

SI: So the sit-ins, they would be taking over campus buildings?

NH: Yes, yes. There was an ROTC unit, a Navy ROTC unit on campus and we occupied the Navy ROTC office.

SI: You got there in the fall of '67.

NH: Right.

SI: Then the following summer is '68.

NH: Right.

SI: Were you active around that time?

NH: Yes, but I was not in Chicago for the summer of '68. I was back in Wilmington, so I missed the great drama on the streets of Chicago.

SI: Now, did you continue after that freshman year to be involved in the anti-war movement on campus?

NH: Oh, yes. Yes. I'm not sure exactly which year I did what. I don't think the ROTC occupation was my freshman year. It was various things in various years. I was there in the spring of 1970, which was when the Kent State tragedy occurred and that was obviously an intense period. [Editor's Note: On May 4, 1970, Ohio National Guardsmen fired on students at Kent State University, killing four and wounding nine others. Some of the students had been protesting the United States entry into Cambodia, while others had been passing nearby or observing the demonstration. On May 14 and 15, 1970, students at Jackson State College protesting against racial harassment were fired upon by state and city police, resulting in two deaths and a dozen injuries.] Students went on strike, the school closed down, as occurred at campuses across the country. It was really quite a remarkable moment. So, only by remembering sort of when a particular march on Washington happened or something, would I be able to place it in which year I was in college.

SI: As a journalism major, were you involved in like the school paper?

NH: No, I didn't get involved in the campus newspaper. That actually just didn't interest me that much. Then, my last year--I actually graduated with a degree in political science because during my junior year. I decided that journalism was not what I wanted to be my major. Northwestern has an excellent journalism school, but I began to doubt. I don't want to say it was vocational, but it was so oriented toward a certain profession and toward a certain style of writing and I had second thoughts about putting all my eggs into that basket.

SI: You graduated with a degree in political science in 1970?

NH: '71.

SI: '71, okay. Then did you go directly to Georgetown Law?

NH: No, I didn't. I spent a year in Chicago. I was working as essentially a paralegal in the Northwestern Law School Legal Aid Clinic. That was a hotbed of young radicals at the time. It was during that year that I decided that I wanted to go to law school. I didn't apply to law school when I was a senior in college. I found that I really loved the work and loved the skill sets that were part of lawyering and there was a good match between my skills and those that law drew upon. So, that's when I applied to law school.

SI: Was it just sort of the general atmosphere of the Legal Aid office or were there particular interactions that led you towards that?

NH: I certainly formed friendships there and connected with people on a personal level and that was very important. It wasn't so much the particular areas of law as the engagement with law as a mechanism for social change.

SI: What led you to pick Georgetown? Can you kind of describe the atmosphere here in '72 when you came?

NH: I picked Georgetown--it was appealing to me to come to Washington. Georgetown had a reputation then as now as a very public interest law oriented school. The location in Washington fed that, I think, and still does. It was, even then, a leader in clinical education, which in part, because I had been part of a clinic at Northwestern Law School, I understood that the sort of progressive political edge of legal education at that point, especially in terms of the institutional location would most likely be in the clinics. Georgetown was already the national leader in that. So I think all those things together were what convinced me to come to Georgetown.

SI: Again, the atmosphere question. I am basing this on a number of interviews I have done with people who went completed their undergraduate education here in the '60s and they talk about how it was more conservative then, and then it became, in their opinion at least, more radical. I was wondering how would you peg the faculty and the students at Georgetown?

NH: At the law school? Well, the students struck me--of course, you always form your own friendship groups. So, I very quickly fell in with people who were as interested in various social justice issues as I was. It was not difficult to find those people, let's put it that way. It seemed to me more conservative than college, but I think that's because my friendship group in undergraduate school was also politically compatible. So, you sort of first arrive at law school and you look around and there are all these people who want to be business lawyers and you think, "Where did they come from? Were they in undergraduate school, too?" So, partly it was adjusting to that. The faculty was mixed. I would say that it was pretty generationally aligned in terms of--I'm sure there were people in the faculty who were quite conservative, but for the most part, the faculty here was not unlike what it is now. I'd say the center of gravity is what I would call a kind of civil rights liberalism. So probably, by that point, by 1972, my guess is that the law school was considerably more politically progressive than the main campus. I never did anything--I never engaged with the main campus, which is easy to do because of the physical separation, but that would be my hunch.

SI: Were there any professors or courses that were particularly influential for you in that time period?

NH: In different ways, yes. I had a couple of the first woman law professors here at Georgetown. Judy Areen joined the faculty when I was here and so she taught me family law. A woman who was a visitor--she was a Department of Justice lawyer and I think she was considering an academic career and I guess decided against it, or maybe she was just here as a visitor from practice--I don't know--but a woman named Monica Gallagher, who was a Justice Department lawyer, taught civil procedure. She was dynamic because she was activity engaged in lawyering, in the civil rights division of the Department of Justice. Then there were any number of folks who were important. Wally Mlyniec, who's still here, was just starting the juvenile justice clinic at that time. He became a leader in clinical education. A woman named Sandy Rothenberg, who's now a judge in Colorado, ran a criminal defense clinic program that I participated in. Then some of the folks here were just really excellent teachers.

SI: Do any of the cases that you had contact with in the clinics stand out?

NH: Not really. They were small individual cases and so I can't really say that any of them stand out, no.

SI: Did you continue to be involved in things outside of the classroom or does law school take up all your time?

NH: No, I was involved. At that point, I'd become very interested in women's legal issues and I was also in the process of coming out as lesbian. So I got involved during law school as a student member, I guess, of the Women's Legal Defense Fund. I worked in a pro se divorce clinic, not a clinic run by the school, but a community clinic run by the Women's Legal Defense Fund. There was also a local feminist activist organization called the D.C. Area Feminist Alliance. That might have started after I graduated from law school. It was all part of that 1970s period.

SI: What kind of cases would your work on in the clinic? You said that it dealt with issues of divorce, generally.

NH: Pro se divorce meaning that the woman, or the plaintiff--but it was oriented toward women--who wanted to get a divorce [and] couldn't afford a lawyer--pro se means representing yourself. So they were, by definition, simple matters, generally uncontested divorces, but at that time it was--I don't actually know exactly how it operates now, but let's say if husband and wife had no children or maybe had one child, but not a lot in property and it wasn't contested, both of them wanted to get the divorce, it can cost a lot in legal fees. For low-income families that was very tough. So, it was not oriented to dealing with difficult or tricky, or precedent setting cases. It was oriented to providing a service to people who needed, a very simple legal matter taken care of, but they didn't have the resources to pay for lawyers.

SI: So at this point, I do not want to say early in the LGBT rights movement--

NH: No, it is.

SI: It is a breakwater point.

NH: Yes.

SI: Was there, for example, a student organization here at Georgetown Law? Was there an interest group around the legal issues?

NH: Not at the time that I graduated. Shortly thereafter one formed. That led to a significant case in which the gay student group here at the law school and the gay student group at main campus sued Georgetown and won in the D.C. Court of Appeals, an order saying that Georgetown University had to grant them the benefits of student recognition. When I graduated, the year that I graduated, to my knowledge, there were three gay people in the class. I'm sure there were more, but the only other two that I knew were two friends.

SI: So you graduate in '75.

NH: '75.

SI: Did you go right to work for the American Civil Liberties Union?

NH: No, I practiced here. So, I practiced here for a year, apprenticing actually, with a woman named Ann Garfinkle, who was a small private practice, National Lawyers Guild, left-associated lawyer. At that point, I was becoming more active in the National Lawyers Guild and that became an important organization for me during this period of the late '70s into roughly the early '80s. I was pretty active in the National Lawyers Guild, which was and is an organization of left-identified lawyers. I worked with Ann for a year right after I graduated and then five of us formed a women's law collective and we practiced law. I practiced law there--what are we at now, '76--for five years. Then, in 1981 I moved to New York and joined the ACLU.

SI: What kind of cases would you take on in that period in between law school and the ACLU?

NH: Different ones of us in the office did different types of things. I tended to do employment discrimination and family law. One of my partners did a lot of landlord-tenant law, representing a lot of tenant unions. Employment, family law, and criminal defense were the sort of bread and butter sources of income.

SI: When you say it was a collective, did you operate on the economic model of a collective?

NH: Yes, we did. Lawyers were not paid more than the legal worker.

SI: Looking back, did that work out well, that model?

NH: The pay part worked well. We were all paid--I don't remember how much, but it seems that was the last moment in which you could live in a city comfortably with a modest income. I don't remember exactly how much. The thing that--we finally had to readjust was the division of labor. I guess there were three parts of the collective enterprise. One was how we were paid. One was decision making within the group. It was a small group. One was the division of labor. The shared decision making and the shared income distribution were no problem, but those of us who were lawyers just could not take the time to do some of the work that didn't require lawyers. So we ended up needing to hire--we started with one person who was not a lawyer and we ended up needing to hire another person who was not a lawyer because the attempt to divide support activities did not work.

SI: In '81 you moved to New York. Was that to go to the ACLU job?

NH: Yes.

SI: Tell me about the process of getting that job and applying.

NH: I'm pretty sure that I found out about the job through someone whom I knew from the National Lawyers Guild, a woman named Rhonda Copeland, who is now deceased. She did not work in the ACLU. She worked at the Center for Constitutional Rights, but I'm pretty sure it was Rhonda who told me about the job because I did not know the people who were in that office where I went to work. I think that's how I found out about it. So I applied. I went to New York to the interview, got the job and then moved up there.

SI: Now was that the Reproductive Rights Project?

NH: The Reproductive Freedom Project.

SI: Tell me a little bit about that project and what its status was when you got there in size and what you were put to work on.

NH: Janet Benshoof was the director of the project. Suzanne Lynn was, I guess, the only other staff lawyer. She was there before I was. I think it was a woman named Judy Levin who had left and that created the opening that I filled. So there were just the three of us there and secretaries. The work basically consisted of constitutional litigation around the country. I moved there in 1981. I have this vague memory of it being warm, so maybe it was the spring or summer when I moved up there. This was a point when the backlash against *Roe v. Wade* had built up and was continuing to build up. [Editor's Note: *Roe v. Wade* is a 1973 Supreme Court case where the Supreme Court ruled that states cannot ban abortions that occur within the first trimester. It was a 7-2 decision.] One of the first cases that I worked on there was--and the point that I worked on it, it was already in the appellate courts was--the Akron case. [Editor's Note: *City of Akron v. Akron Center for Reproductive Health* was a 1983 Supreme Court Case where the ACLU of Ohio challenged the regulations for abortion setup by the city of Akron, Ohio. The court ruled in the ACLU's favor stating that many regulations were unconstitutional.] That was one of the early efforts by the anti-choice folks to try and reverse *Roe v. Wade*. We were totally successful in that case. I think the Supreme Court decided it in 1983 and at that point, the seven-justice majority that had decided *Roe v. Wade* was mostly still there. As that majority diminished over time, abortion rights grew weaker and weaker. While I was with the Reproductive Freedom Project, I wrote parts of appellate briefs when cases were in the appeal stage and I litigated cases at the trial stage.

When I began the nature of the abortion rights or reproductive rights practice actually was very much like what it is now in one sense, which is that we were concentrated almost entirely on challenging restrictive state laws. One of the things that changed in the early '80s when I was there happened because President Reagan was elected. Then the anti-abortion agenda was incorporated at the federal level.

By the time I left that project in 1986--so I was there for five years--several of our biggest, most important cases were challenging federal statutes and federal policies. When I arrived there in 1981, I don't think we had a single case challenging a federal policy. It wasn't because there were no anti-choice federal policies before then, but the challenge to the worst federal policy Hyde Amendment, had been already lost, shortly before I arrived. [Editor's Note: The Hyde

Amendment was passed in 1976. It bans the use of federal money for abortion. This applies to women who are on Medicaid, which is the federal health care program for low-income people.] So I did trials and pre-trials in Louisiana, Kentucky, Utah, Florida, Nevada, Minnesota, and various other places around the country, Florida.

SI: Can you tell me a little bit about what went into preparing for those cases? Was there an overall strategy or was each state so different?

NH: The states were different to some extent, but we always litigated in federal court. Essentially, the question was whether various restrictions that were designed to chip away at a woman's ability to get an abortion, whether they violated the principles then of *Roe v. Wade*. So, a lot of what the litigation consisted of was summary judgment motions plus some trials. I spent a significant amount of time preparing our expert witnesses to demonstrate the factual impact of these restrictions and deposing witnesses on the other side. So that was the bulk of the practice. Interestingly, right now, that's the bulk of the practice again. The law has shifted in a way that I think is quite unfortunate. Given the last eight years of the Obama administration, there aren't that many cases or issues involving federal policy for the most part, but you've got all these restrictive state laws. During periods when the country has had conservative presidential administrations, there have been a lot more federal law issues.

SI: From what I understand, the Hyde Amendment was about restricting access by cutting funding to Medicare?

NH: Medicaid.

SI: Medicaid for poor women.

NH: Right.

SI: So these would be on the state level, similar methods that you were trying to challenge?

NH: Right.

SI: Was that also financially based?

NH: No, it wasn't mostly financially based. There were some versions of that same issue of cutting public funding that were litigated under state constitutional provisions that came out better than the federal challenge did. Mostly, the laws we challenged involved issues like parental consent for teenagers or forced waiting periods, so that women had to make two trips and so forth. It was the beginning of what is now the intense attack on abortion-providing facilities by requiring that they have expensive equipment and facilities essentially like a surgical center, which is just completely unnecessary. There were requirements that the counseling had to be done by a physician and couldn't be done by a nurse. I can't even remember what all of the restrictions were. There have been dozens over the history of this period. So, that was the nature of the practice, and in each state there was a slightly different political constellation or set of issues.

SI: I understand the Reproductive Rights program split off from the ACLU?

NH: Right.

SI: Was it the end of that period?

NH: Well, it was definitely after I had left the Reproductive Freedom Project. I think it was the early '90s when they left the ACLU. I'm not sure.

SI: While you were there did you feel the project got its due from the larger organization? Was there any indication something like that was forthcoming?

NH: I was surprised when the project left. At that point, I had been out of daily abortion rights work for several years but I think the issue, as far as I understand it, revolved around funding. The Reproductive Freedom Project and the abortion rights issue at that time got a tremendous amount of funding and it did allow the project to grow. During the time I was there we expanded to at least four lawyers, plus we would hire a fellow who was right out of a clerkship or out of law school to be there for a year. So it was expanding. The litigation expenses were growing and those had to be funded as well. My impression, and this is completely second, third hand--but my impression is that the Reproductive Freedom folks, especially Janet, felt that the potential existed for a level of funding that would carry an entire organization as it is now...that she had the ability to raise that funding and that, to some extent, the central organization stood in the way or there would have to be some sharing of the funding. Those are details that I really don't know, but my impression is that that was the sort of fundamental dynamic that led to the split.

SI: On the five-year period when you were working on these cases, you were focused on the cases themselves, but were you part of the effort to fight the battle in the public realm?

NH: Oh, sure. I wrote op-eds and we did press and spoke at national events. We did speeches in local areas also, in Salt Lake City or New Orleans or Louisville, Kentucky or wherever the cases were going on. We didn't just litigate. We also participated in doing outreach to other community organizations, partly as a way of coalition building to increase public support for the litigation and for the issue in those places. So, I was part of that. I think we were all part of that. We also testified in Congress and in state and local legislatures. We were primarily engaged in litigation, but we were also very much engaged in public education and in trying to assist the state affiliates of the ACLU and our clients in their state and local advocacy.

SI: What would you say were your most vivid memories of that time, either in the courtroom or outside?

NH: That would be a mixture of personal and professional memories. Certainly, in the day-to-day piece of it, for me it was the first time I had ever done any substantial amount of work travel. I found that in my first few years there I was spending twenty five percent of my time travelling and going into these various places to do pre-trial motions or to do trials. So, I suppose one of the most vivid lessons that I feel like I learned that I very much used when I was doing the LGBT and AIDS work was the extraordinary power and value of the ACLU state affiliate network, especially at that time. The ACLU was the only organization that had state affiliates in every state. We had our national office in New York and there was a legislative office here in D.C. that dealt with Congress. There are tons of progressive organizations that had a national office in one of those two places or maybe both. There was no other entity that had an effective affiliate network the way that we did. That was extremely valuable because it meant that there was an ACLU person who was known to and active in the state legislature in Nebraska, or

Colorado, or whatever. That gave us--especially with the abortion rights debates, so much was involved at the state level in terms of where the legislation was coming from. So that was something that I hadn't realized before taking the job. I hadn't realized that this distinction between the ACLU and all the other groups existed and how important it was. I have to think a bit about other specific vivid moments.

SI: We can always come back to it. So in 1986, that was when you made the transition from the Reproductive Freedom Project to the newly created--what was it called?

NH: It was called the Lesbian and Gay Rights Project at that point.

SI: So how did that come about?

NH: Tom Stoddard and I had been pressing the national ACLU to start a lesbian and gay rights project for several years. [Editor's Note: Tom Stoddard was an adjunct professor at the NYU School of Law and lawyer for the New York Civil Liberties Union. He became the executive director of the Lambda Legal Defense and Educational Fund. He died in 1997.] Tom was a very important gay rights leader at that point. He died in, I guess, the 1990s, but in the 1980's he was on the staff of the New York Civil Liberties Union, which was housed in the same building as the national staff. So he and I became friends. He was a wonderful, wonderful guy, very smart, very impressive. He was on the New York staff, and I was on the national staff. He was doing gay rights issues as part of his job in the New York staff. I didn't have any portfolio for gay rights issues, but I was a volunteer lawyer with the Lambda Legal Defense Fund, which at that point, rented space in the ACLU building.

We were both pressing the ACLU to begin its own project. At that point in time--so this is 1984, 1985 roughly, there was no national organization that did any gay rights work except for the gay organizations. If you did gay rights work you were, by definition, a gay organization because nobody else would do it. So we both thought it was really important for the ACLU to become more visible in this area. The ACLU had done gay rights cases for years and years. In southern California and various places, the state affiliates did it, but there was no defined national office project in that area. So we both pressed Ira Glasser, who was then the Executive Director of the ACLU. The issue was that the ACLU financial model was that all of the national office projects were supported by foundation grants. A Ford Foundation grant created the Women's Rights Project and various other projects. It might have been a Rockefeller grant that created the Reproductive Freedom Project. But all of the projects were, within the institution, defined as being "extra" and supported by these money grants. There was no foundation that funded gay rights at that point. Maybe a tiny family foundation from a wealthy gay or lesbian donor or something, but Ford wouldn't touch the issue, [nor] Rockefeller. None of the major foundations would touch the issue at that point. What happened is that James Hormel, a longtime ACLU member and leader from San Francisco, a wonderful man, basically wrote a check for fifty thousand dollars, when Ira said, "If we can find fifty thousand dollars, we'll start this project." I can't imagine starting anything on fifty thousand dollars, but that was the magic number. So it went forward from there. It was really Jim's generosity that forced the issue within the organization. So, the project started in 1986.

SI: Was he approached by you?

NH: No, he was approached by Ira. Ira went to the very few individuals he thought would be willing to do this. So, no, we didn't have to literally raise the money ourselves in that way. Actually, the other person who was key to that was Dorothy Ehrlich, who was then the Executive Director at the Northern California affiliate, which was Jim's home base. It was to Dorothy's credit also because he was her donor. I'm sure he donated to the national organization, but he was a big northern California supporter. Dorothy was extremely supportive of starting a lesbian and gay rights project. I'm sure that if she had not been, it would have been much more difficult to do so.

SI: How did you go about setting up the project once you had the money?

NH: Well, it was me basically. It was me and a secretary. Because it was so small, one of the first things I decided to do was to leverage the affiliate network. So I prioritized that, especially regarding AIDS, which was such a significant and urgent issue. In 1986 even though the mechanisms for transmission of HIV were known there was a lot of fear. Over time, the fear became less and less rational, but that was still a moment when the fear of contagion was intense, even with school children and certainly with a stigmatized group, like gay men. So, I set up a distribution system for emerging AIDS-related information because it was so important to be able to counter those fears with documentation, and new documentation was coming out literally every week. It was an extremely dynamic time and field. That was one of the big challenges of starting a gay rights project in 1986.

SI: I read in a piece you wrote about the atmosphere that Congress was considering mandatory testing and really extreme measures. Tell me a little bit about trying to combat some of those more extreme issues.

NH: My AIDS work involved a great deal of public education, as well as collaboration with public health authorities. It was in their interest, to have the public not panic and to have the public understand the best scientific information about mechanisms of transmission. Frankly, it was also very much in their interest to ally with the gay community because they understood, as public health people generally do, that in order to bring about sustainable behavior change, you can't do it by coercion. So there was this massive enterprise involving gay community organizations and the new AIDS service groups like GMHC (Gay Men's Health Collective) and others, together with public health officials--in an effort to contain the spread of the virus. What we did at the ACLU was also try to and contain the spread of the stigma and to counter the voices that were trying to piggyback on this horrible disease to feed their political agenda. In part because it was only me, national office litigation was limited. The most important work was centered in public policy and legislative debates. There were only a few genuinely important cases that emerged during this period.

By far the most important case at the time involved interpretation over a statute called the Rehabilitation Act. Under the Rehabilitation Act, entities that received federal funds (including public school systems) were barred from discriminating against otherwise qualified persons who had disability. The first summer after I founded the project, the summer of 1986, my big project was writing an amicus brief for the Supreme Court on behalf of the American Public Health Association, in a case called *Arline*. This was a tuberculosis case, but it became the vehicle for taking the question of AIDS transmission to the Supreme Court, specifically whether people could be fired from jobs where there was no risk of transmission, but there was this fear of

transmission. [Editor's Note: *School Board of Nassau County v. Arline* was a 1987 Supreme Court case, which ruled that a contagious disease can qualify as a disability and protects a person from employment discrimination.] So we were very lucky that a teacher in Florida had brought a federal court case after she was fired because she tested positive for TB, because it would have taken years to get an AIDS case before the Supreme Court and the TB case was already there in 1986. Tuberculosis is much easier to transmit than HIV, but the issue became the transmission of all communicable diseases. So I wrote an amicus brief in that case. The Reagan Justice Department took the position that people should be fired or fire-able even if the fear of contagion was irrational. This was just an outrageous cave-in to the far right, and that Supreme Court rejected that argument.

We won the *Arline* case, which was a huge, huge turning point for AIDS issues. That was the watershed for the analysis of employment protection. Employment protection for people with HIV/AIDS was based on disability law. Tuberculosis is a disability. HIV/AIDS is a disability. *Arline's* claim was based on a law that prohibited discrimination based on disability. So disability then became the frame that we used in a significant part of the work of representing people with HIV/AIDS.

SI: Now, in reading different accounts the name of the project goes from gay and lesbian to also AIDS. Is that a separate project or was it all under the same office?

NH: We structured it as two projects. We added the AIDS project, in part, because of funding issues, because at that point there were a couple of funders like amfAR, who were willing to fund an AIDS project, but even they did not want dollars going to a lesbian and gay rights project. [Editor's Note: The American Foundation for AIDS Research was founded in 1985 and conducts AIDS research.] As far as staff, it was essentially the same people, although some people worked more on one issue than the other. At that point, we had expanded. Bill Rubenstein was there. Judy Levin was there for a while.

I hired Chai Feldblum who worked in Washington because the other gay and legal organizations, had no presence in Washington. [Editor's Note: Chai Feldblum a commissioner in the U.S. Equal Employment Opportunity Commission. She was legislative counsel at the ACLU from 1988 to 1991 and later a professor at Georgetown Law] There were the gay lobbying organizations like HRC [Human Rights Campaign] and the National Lesbian and Gay Task Force in Washington, but their role, which was certainly important, was heavily oriented toward lobbying for money for gay services. They didn't have legal expertise. Their staff members, even if they were lawyers were basically lobbying over dollars. So, what was needed in Washington was an organization that it lobbied over issues and the substance of the law, and that was the ACLU. That is why, even though I was based in the New York office, I hired someone to work in the D.C. office. She became one of the primary drafters of the Americans with Disabilities Act, which extended the prohibition against discrimination based on disability to the private sector. The statute issue in the *Arline* case applied only to public entities and federal grantees. The enactment of the Americans with Disabilities Act in 1990, basically settled the issue in terms of employment discrimination against people with HIV. It did not magically eliminate all the problems, but it settled what the rule would be for the vast majority of situations.

So to sum up my work on AIDS--first I concentrated on the *Arline* amicus and then the work on the Americans with Disabilities Act--those were incredibly important things to do at that point in time.

SI: I saw some areas where you were working, like the rights of gay and lesbian service people. Can you tell me a little bit about that, the *Watkins* case? [Editor's Note: *Watkins v. United States Army* was a 1989 Ninth Circuit Appeals Court case which allowed Sergeant Perry Watkins, an openly gay soldier, to reenlist in the army.]

NH: Yes back to the lesbian and gay rights issues. One of the ironies of the beginning of this project was that it opened doors in June of 1986 and then almost immediately the Supreme Court decided *Bowers v. Hardwick*. [Editor's Note: *Bowers v. Hardwick* was a 1986 Supreme Court case that ruled that consensual sodomy is protected by the Constitution.] Needless to say, that was a disaster. All of the lawyers thought we were going to win *Hardwick*, albeit narrowly. Instead, we lost narrowly.

There were many challenging issues on the lesbian and gay rights side of things. The military issues were essentially a dead end, given the tradition of judicial deference to the military. Mostly the Project steered clear of the litigation of any of those cases of that time. The *Watkins* case was one where we did get involved. It was litigated out of the ACLU of Washington. *Watkins* was a terrific case. It led to an important ruling on equal protection grounds in favor of Perry Watkins. We all understood that the panel decision was not going to survive because it found that sexual orientation classification should be subject to strict scrutiny but it turned out well nevertheless. The great appeal of the case was that it also had an equitable estoppel issue, because the Army had let him reenlist knowing that he was gay and then tried to strip him of benefits. So the ACLU did win the *Watkins* case. It was the only military case that was won for years and years, although it was ultimately won the estoppel question. It was a great case for public education purposes as well. When the panel of the Ninth Circuit ruled for Perry Watkins in that case, it got a huge amount of attention, as it should have.

I argued a case myself in the Eighth Circuit that involved funding for a gay student organization at a public university. There had been a series of cases holding that public universities had to recognize gay student groups. The case that I won in the Eighth Circuit took the law further and held that the groups also had a right to funding on the same terms as other student groups. Also, in the wake of *Bowers v. Hardwick*, with the Supreme Court having found that criminal laws against sodomy were constitutional, what the movement then did was to go into state courts. We challenged sodomy laws on state constitutional grounds where we thought state appellate courts might be receptive. That was quite successful. That was also another example of how the state affiliate network of the ACLU was invaluable, because it was our state affiliates who litigated a lot of those cases. The Project assisted on the state sodomy challenges to various degrees. By the time *Lawrence [v. Texas]* got to the Supreme Court seventeen years later, there were half a dozen states, including ironically Georgia, where the state supreme court had found a sodomy law unconstitutional under the state constitution, even though the US Supreme Court had said that there was no federal constitutional right.

SI: *Lawrence* was the one that struck down the Texas law?

NH: Yes.

SI: Hand in hand with the AIDS-related efforts, that brought up a lot of other rights issues regarding right to visit partners, inheritance, and issues like that. How did your project deal with those issues?

NH: We did some model laws, including doing a model confidentiality law. For me personally, it was fascinating because abortion obviously is a medical issue as well. So I had some personal history in terms of litigating the constitutional dimensions of health related issues and some experience in just working with medical experts. With AIDS, it cut across so many areas of health related law. It was confidentiality. It was medical records, privacy. It was hospital visitation. It was Medicaid coverage. It was private health insurance issues, employment issues, school issues. It really ran the gamut. Almost every issue in American public law popped up someplace in that context. The Project also did the *Braschi* case, which was a lesbian and gay rights case, but came about because of AIDS when the so-called “roommate” of a man who lived in a rent-controlled apartment died of AIDS. The legal question was whether the survivor would be treated as a spouse under rent control regulations. We won that case in the New York Court of Appeals. You never know why you win a case, but there are a lot of examples of that. So who knows what was essential in winning or losing, but the fact that the man who died had died of AIDS and there was growing public sympathy and understanding about the impact of that disease on this community, I feel sure that helped us in reaching the judges in that case. Also, it made it into something more significant than this one personal story because it was easy to imagine that it applied to a lot more gay male couples than just this one couple. So the *Braschi* case was an important victory for the ACLU in that time.

As with reproductive rights issues, we took our advocacy to many venues. We did congressional testimony. We testified before state legislative committees. We wrote a book as well as writing papers and op-eds. We did a lot of public speaking. This was all in addition to litigation. So we had a very multi-dimensional focus to our advocacy.

SI: One of the questions I always ask about is the relationship between the legislative office and the national office, where your main role is litigation and theirs is more addressing potential laws. It sound like you found this, method by hiring Chai Feldblum. What other ways did you work with the legislative office?

NH: Our primary goal for the legislative office was the enactment of the Americans with Disabilities Act. That bill was at least as important to people with HIV and AIDS as it was to any other disability group. There was an attempt at the very end by social conservatives to amend the ADA to drop coverage of HIV. The disability groups held firm and refused to go there. Unfortunately, conservatives did enact an amendment that excludes transgender from the definition of disability, but that was just not a winnable issue at the time. So we all drew the line was on HIV and AIDS. That was the main issue for us in Congress.

SI: In 1990, you left the project to go to Brooklyn Law?

NH: Right.

SI: What motivated you to do that?

NH: Well, it was a tough decision because my ACLU position was a great job. I was having a great time doing it. I was very aware that it was an absolute plum job for anybody interested in

doing social change or public interest law. The truth was that I wanted to be able to speak in my own voice and to be able to analyze and critique some of the framings that lawyers invariably develop and have to develop in order to represent their clients and their issues. I felt like I could have continued to do it for many years and it would have been very important work as we see, but for me, it became less satisfying over time. I wanted to have an independent voice, and you can't engage in that sort of analysis and critique if you're a spokesperson for an advocacy organization. That's just not appropriate. Plus, if you're a lawyer you have clients. So, it was a question of moving into a different role and being able to write and to write without worrying that something I said might be used against my clients or somehow conflict with positions that the ACLU was taking.

SI: In your career post going into academia, did you continue to work with the ACLU in later cases like Windsor and others?

NH: Yes, I've continued to--for a while, I think I was counsel to the Project. I had to give that up when I went into the Clinton Administration. I still participate in some strategy discussions. I'm now also distinguished scholar with the Williams Institute, which is a research institute on sexual orientation and gender identity at UCLA. So yes, I have remained very active. I've written a number of amicus briefs. When I started teaching, I was still co-counsel--actually with one of my Georgetown colleagues now, David Cole, in the National Endowment for the Arts litigation that came out of a funding issue at the very beginning of the 1990s. Karen Finley was the lead plaintiff in that case and I represented Holly Hughes. [Editor's Note: *National Endowment for the Arts v. Finley* was a 1998 United States Supreme Court case. The case involved Karen Finley, a performance artist, who filed a suit against the National Endowment for the arts.] David and I were the lead lawyers. That case was still going on when I went to work for the Clinton Administration, so obviously I had to withdraw from that and from any ACLU-related activities. Then after I left the Clinton job and went back into teaching, I started again writing amicus briefs and consulting with people.

SI: Can we pause for a second?

NH: Sure.

[Tape Paused]

SI: I could probably be here all day asking about your time in the Clinton Administration, but could you tell me how your work with the ACLU influenced your role in that administration, in terms of policy related to AIDS and so forth? Obviously, you have no direct ties as you said. It seems like it was a continuation of what you were trying to do there.

NH: Right. Yes. Well, it's interesting. One of the cases that I did when I was at the ACLU was a challenge to the CDC guidelines on the content of AIDS educational materials. That's another case on which David Cole and I were co-counsel. In fact, those were the two cases that I stayed involved in as an attorney after I went into teaching: the NEA case and the CDC guidelines case. So, as it turned out, when I went into the administration, those were still live matters. The NEA had not yet gone to the Supreme Court. The CDC case, if I remember correctly, was mostly resolved. I think we had settled it on very favorable grounds, but maybe there was some kind of continuing supervision by the court. I'm not sure, but I do remember that the CDC guidelines

issue was one that I specifically recused myself from when I became deputy general counsel at HHS because I had been involved in challenging the constitutionality of a previous version of it. So there was a firewall and I had no role in advising the agency on that.

I was involved in other AIDS issues. For example, I represented the United States at two international AIDS conferences. So I was able to have some influence in terms of HIV related policy so long as it did not overlap with anything that I had been involved in before joining the Administration. Of course, it was the Clinton Administration and not the Bush Administration, so the policy became much better. The main thing that I worked on in the first year and a half was legal work related to health reform. That's the reason I wanted to go into the administration. It was the great hope of 1993 and '94 was that there would be health reform. So, I did a lot of work on a variety of issues related to health reform that built on my HIV work. One example was privacy of medical records, which was something that I knew a great deal about because of the work I had done regarding AIDS. Another issue was consumer rights, what I mean by that is rights vis-à-vis health insurance companies. Again, that was something that had come up quite frequently in the context of AIDS, so that was the context in which I learned that body of law; then I took that knowledge with me to HHS. After health reform failed in 1994, I wrote this memo saying that where the administration should go after that should be a health care bill of rights, a patient bill of rights idea that was reframed in terms of insurance. Shortly after I'd left the administration in 1996, Congress created a presidential advisory commission on health care. President Clinton appointed me as a member, although it was Secretary [of Health and Human Services Donna] Shalala who put forward my name. It was in that context that I moved forward on this effort to develop a health care bill of rights focused on access to health insurance coverage. And it did emerge from the commission in, of course, compromise form. So, that was another example the trajectory from working on HIV/AIDS issues to broader health law issues.

SI: You said things were a lot better under the Clinton Administration, but working within it, did you find that they were receptive and really wanted to work on resolving these issues or was it just playing to a constituency?

NH: In the previous twelve years there had been a major right wing effort to go after progressives on these issues, and there certainly wasn't that in the Clinton Administration. But like any administration, the political leadership was constantly judging popular support for any given issue. I didn't expect it to be as if the ACLU had taken over the government or a gay rights group had taken over the government. Life as a progressive public official is genuinely complex and challenging. The greatest education for me was that it was the first time that I had ever been in a position with a great deal of responsibility with multiple constituencies to be accountable to. You're not just accountable to an identity group or a community or even a set of issues. For example, we had to deal with governors. Governors as a group were very important in the administration of Medicaid, because it's a joint federal/state project. Of course [there are a] whole range of constituency groups and some dominate in Democratic administrations and others dominate in Republican administrations, but they're all always out there. You have to navigate appropriately depending on what your policy goals are. That was a great learning experience for me.

SI: Why did you leave the administration?

NH: At the time, there were quite a few law professors in the Clinton Administration and the rule for all of us was--I think all of us got leaves of absence for two years and then an extension to the third year. I think law school deans must have agreed on this timeline. After the third year, you either went back or you lost your position--you lost tenure or you lost your tenure track status or whatever. I was clear that I wanted to be in academia at that point for the same reasons that led me there in the first place. Seeing from the inside was enormously valuable, but I never intended to stay in that kind of position. So I was there for three years and then went back to teaching. The woman I worked with, Harriet Rabb, was from Columbia Law School. [Editor's Note: Harriet Rabb was a Columbia Law professor and dean and then served as General Counsel in the Department of Health and Human Services during the Clinton Administration. She has been the general counsel of Rockefeller University since 2001.] She elected to stay. She's a bit older than I am and so, for her, I think losing tenure was not such a big deal, and she did lose her position at Columbia

SI: Was that at the time that the Defense of Marriage Act was being pushed through? [Editor's Note: The Defense of Marriage Act, or DOMA, was passed in 1996. It originally stated that the federal government did not have to recognize gay marriage. However, the Supreme Court declared this section of the law unconstitutional. It is known as Section Three.]

NH: Yes, the Defense of Marriage Act was enacted in 1996. I arrived on June 1 of '93 and I left on June 1 of '96. So, the Defense of Marriage Act, most of that activity was after I left, although I was involved in some of the discussions because I knew the people who were involved at that point.

SI: Was it shocking to you the way it turned out?

NH: Not really. It was so obviously a Republican gambit to force Clinton to either alienate the gay community or alienate more conservative Democrats, whose votes were essential to his re-election. The bill passed Congress about three or four months before the election. It wasn't any surprise to me what he did. Of course, I wish he had acted differently, but I wished even more that Republicans would not take over the Executive Branch in 1996. The Republicans did exactly the same thing with welfare reform that they did with DOMA. That same summer of '96. If my recollection is correct, they passed a punitive version of welfare reform. The administration had proposed a very different approach to welfare reform. They passed that and the Defense of Marriage Act and Clinton signed both. In doing so he alienated folks who were active in anti-poverty efforts and he alienated gay rights people. But, the people in both of those groups had to ask, compared to what? Are you going to vote for Clinton or are you going to vote for--the Republican nominee, Bob Dole. So, to me, the outcome of that process--there's nothing noble on either side of that game, but I wasn't surprised by the outcome.

SI: We are getting close to four. I wonder if we can jump ahead and you can tell me a little bit about your involvement with the *Windsor* case. [Editor's Note: *United States v. Windsor* is a 2013 Supreme Court case which declared Section 3 of the Defense of Marriage Act unconstitutional.]

NH: For the *Windsor* case, my only significant involvement was my writing an amicus brief. Since I left the government and came back to teach, I have been involved, I've helped people moot arguments and I continue to participate in a group called "the roundtable." It's a meeting

every year or twice a year of the lawyers from all of the LGBT legal organizations, plus a few of us who are grandfathered or grandmothered into it because we once worked for those organizations and now we're academics. There are three of us who are in that category. A lot of strategy discussions happen at those meetings. That's been my involvement in it.

SI: Is there anything else you would like to add about your time at the ACLU?

NH: Not that I can think of at the moment.

SI: Well, you can always add stuff to the transcript. I really appreciate all your time today. If I have some follow-ups can I give you a call?

NH: Of course. Sure.

SI: Thank you very much

NH: Sure.

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