

September, 2009

ARTHUR GARFIELD HAYS CIVIL LIBERTIES PROGRAM  
ANNUAL REPORT 2008-2009

The work of the Hays Program took place against a backdrop of economic downturn, the war in Iraq, and the election of Barack Obama as President. We continued with traditions and introduced some changes to the program. As in past years, a former Hays Fellow met informally in Norman's office and then over dinner with current Fellows to discuss experiences with the Program, career choices, and other issues. Rachael Pine, Hays Fellow 1982-1983 spoke with us in the fall, and Ricky Blum, Hays Fellow 1988-1989 joined us in the spring. We continued with our recent practice of inviting a distinguished public interest lawyer to meet informally with the Fellows. Steven Shapiro, Legal Director of the ACLU, shared his thoughts about the current state of civil liberties and the changing roles of public interest organizations. In addition, Anjana Samant, Hays Fellow 2000-2001, participated in this year's selection process and provided valuable assistance. In May, we hosted the third annual reception for graduating Fellows and their friends, held this year in a local restaurant. It was a delight to meet the partners and friends who have provided support to the Fellows and to share stories with them.

The major change to the Program is the decision to expand the seminar component of the course from one to two credits for the year. As part of this change, each of the Directors will now lead a seminar discussion on an issue concerning civil liberties or public interest litigation. This year, Norman's seminar focused on judicial biography; Sylvia's, on an evaluation of the reproductive choice movement's litigation strategy; and Helen's, on a five-nation empirical study of judicial enforcement of constitutionalized health and education rights. Another Program innovation is the establishment of a website, which we urge you to visit:

<http://www.law.nyu.edu/academics/fellowships/haysprogram/index.htm>.

## 1. THE FELLOWS

The Fellows for 2008-2009 were Jess Braverman, Tom Stoddard Fellow; Vinay Harpalani, Palmer Weber Fellow; Ryan Hooper, Robert Marshall Fellow; Amy Kimpel,

Roger Baldwin Fellow; Elizabeth Seidlin-Bernstein, Deborah Linfield Fellow, and Molly Tack, Leonard Boudin Fellow.

The work of the Hays Fellows — always the heart of the program — reflects the ever-evolving challenges to civil liberties. The rights of immigrants, racial discrimination, and GLBT issues commanded most attention from the Fellows. The First Amendment, rights of juveniles and consumers, and people with disabilities also provided much work. Many of this year's Fellows were supervised by former Fellows who are now staff attorneys or supervisors in some of the City's leading public interest offices.

Here is a summary of the work done by the Hays Fellows this year.

Jess Braverman, Tom Stoddard Fellow. In the fall Jess interned with New York Lawyers for the Public Interest's Health Justice Program. The program addresses barriers faced by New York communities of color and immigrants seeking access to quality health care. She participated in a Title VI claim regarding discriminatory policies targeting Medicaid patients, and she gathered data to challenge policies that lead to separate and unequal outpatient care for Medicaid patients as compared with privately insured patients.

In the spring Jess interned with A. Gabriel Arkles (Hays Fellow, 2003-2004) at the Sylvia Rivera Law Project. She advocated on behalf of incarcerated transgender clients facing unconstitutional denials of health care and immediate threats to physical safety. She also researched and wrote a memorandum on the right of incarcerated clients to reading materials with transgender content for publication in an appendix to the Jailhouse Lawyers Handbook

Vinay Harpalani, Palmer Weber Fellow, worked in the fall semester with the ACLU Racial Justice Project on a number of litigation projects. He helped prepare evidentiary motions and psychiatric expert witness testimony for a racial profiling case, which settled close to the end of the fall semester.

Vinay's spring placement was at New York Lawyers for the Public Interest. He worked with Miranda Massie doing preliminary research for potential litigation for polychlorinated biphenyl contamination in New York City public schools. Vinay used his science background in doing research on the effects of low level exposure to polychlorinated biphenyls and he helped to identify expert witnesses.

Ryan Hooper, Robert Marshall Fellow. In the fall semester, Ryan worked with Judy Rabinovitz (Hays Fellow, 1984-1985) at the ACLU Immigrants' Rights Project. He researched the constitutionality of a deportation procedure known as "stipulated removal." This increasingly common means of removal requires immigration judges to determine, usually on the basis of a written record, whether unrepresented immigrants have knowingly and voluntarily waived their rights to due process in exchange for immediate removal from the country.

In the spring semester, Ryan Hooper worked with Johnson Tyler at South Brooklyn Legal Services on matters involving unlawful collection of consumer debts. He handled several cases from client intake to legal resolution, expanding his experience with client counseling, factual development, and complaint drafting. Ryan's work culminated in the drafting of a memorandum on whether the federal statute exempting Social Security funds from debt collection applies to credit unions' liens on shares. The memo also discussed possible tort actions based on violation of the statute.

Amy Kimpel, Roger Baldwin Fellow. In the fall semester Amy worked with the New York Lawyers for the Public Interest (NYLPI) Disability Law Center (DLC) which serves as New York City's federally designation Protection and Advocacy Agency, charged with defending the interests of people with disabilities

Under the supervision of Roberta Mueller (Hays Fellow 1984-1985), Amy explored the possibility of crafting litigation in New York based on an earlier Massachusetts case, *Rolland v. Cellucci*, 52 F.Supp.2d 231 (D. Mass. 1999), a successful class action case on behalf of 1500 persons with mental retardation or developmental disabilities housed in nursing facilities. She researched and wrote a detailed memorandum about possible claims that could be filed on behalf of developmentally disabled adults who were needlessly confined to nursing home facilities rather than being placed in more beneficial community settings. In addition, she drafted FOI requests to several state agencies and began drafting a complaint.

In the spring Amy worked with the Legal Aid Society's Juvenile Rights Practice (JRP), JRP is the institutional provider of legal representation for children in the New York City Family Courts. She worked with Christine Bella crafting a class action suit to challenge the use of restraints and lack of mental health services in facilities where juvenile delinquents are confined after being adjudicated delinquent. She researched and wrote a memorandum of law about how the federal Prison Litigation Reform Act ("PLRA") applies to juveniles confined to facilities. She developed legal arguments that PLRA's exhaustion requirements should be interpreted less rigidly when applied to juvenile prisoners. In addition, Amy researched licensure requirements for charter, 853, and special act school districts to get their educational programs licensed as schools.

Elizabeth Seidlin-Bernstein, Deborah Linfield Fellow. In the fall Lizzie interned with the ACLU First Amendment Working Group. She conducted research on the First Amendment implications of the placement of internet domain names on the "Specially Designated Nationals" list maintained by the Department of Treasury's Office of Foreign Assets Control.

For her spring placement Lizzie worked at the Immigrant Defense Project (IDP), where she helped in the preparation of briefs for *Nijhawan v. Holder*, which the Supreme Court decided in June. The case will determine whether an immigration judge in removal proceedings can look beyond the record of conviction to determine whether a noncitizen's crime involving "fraud or deceit" resulted in a loss of more than \$10,000,

making it an aggravated felony, or whether the loss amount must be decided beyond a reasonable doubt by a jury. IDP provided assistance to the counsel for Mr. Nijhawan and coordinated amicus briefs of several other organizations.

Molly Tack, Leonard Boudin Fellow. Molly worked at Lambda Legal Defense Fund in developing a 50-state survey designed to enable the organization to challenge ballot initiatives aimed at limiting LGBT rights. She researched the law in states that provide for voter-generated initiatives or referenda, focusing on the procedures in each state for filing (and challenging) ballot measures to amend state constitutions or municipal charters. She recorded the findings in an Excel database that can be easily updated and disseminated to Lambda chapters across the country.

In the spring, Molly wrote a draft of the ACLU's response to the government's motion in the Eastern District of Virginia to dismiss the ACLU's challenge to the secrecy provisions of the False Claims Act. The Act allows whistleblowers to file qui tam actions exposing fraud by government contractors, contains provisions that require a mandatory seal on all FCA complaints, and prevent the whistleblowers from discussing the substantive allegations or the fact of filing suit for at least 60 days, renewable indefinitely on a showing by the government of "good cause." FCA complaints have remained sealed—withholding important information about alleged fraud from the public—for as long as nine years. The brief argues that the secrecy provisions violate the public's First Amendment right of access to judicial documents and the whistleblowers' First Amendment free speech rights.

## 2. THE DIRECTORS.

Norman Dorsen. Norman continues to divide his time between law school duties, notably the Hays Program, and serving as counselor to NYU President John Sexton. At the University, as a follow up to a two-year study of undergraduate education at NYU that Norman chaired, which was approved by an external accrediting agency, Middle States Association Commission on Higher Education, Norman chaired a new study that examined other academic, and administrative and financial issues for the Commission.

Norman again taught a seminar in Judicial Biographies and Opinions, which explores the jurisprudence of Supreme Court Justices in light of their life experiences. After many years of service as founder and editorial director of the quarterly International Journal of Constitutional Law (ICON), he handed over his duties to his colleague, Professor Joseph Weiler. The journal has authors and editorial board members from more than 40 countries.

Norman was the first U.S. representative on the board of the newly organized International Association of Law Schools (IALS) which has members from all parts of the world (he stepped down last year). This year he helped to organize an IALS world conference on constitutional law. He continues to direct the James Madison lectures at the Law School, to serve as a board member of The Thomas Jefferson Center for the

Protection of Free Expression (in Charlottesville, VA), and act a member of the National Advisory Council of the ACLU.

Norman published a book review of Nicholas Katzenbach's memoir of his service in the Kennedy and Johnson administrations, *Sometimes It was Fun*. 62 *Journal of Blacks in Higher Education* 70 (2009). In addition, Norman completed work on the second edition of *Comparative Constitutionalism*, a casebook that will be published in 2010 that he co-authors with colleagues from Germany, Hungary and the U.S. He also wrote an article, with Professor Susan Herman, who in December was elected the seventh president of the ACLU (Norman was the fifth) on American Federalism and the American Civil Liberties Union. It will be published in a monograph in the fall and subsequently in a law review.

Sylvia A. Law. In the fall, Sylvia taught health law and led a health policy colloquium. In the spring, she was on sabbatical and living in Hawaii. She wrote a chapter on *Harris v. McRae*, the 1980 Medicaid abortion funding case, with Rhonda Copelon, for the book on women's stories for the Foundation Press law stories series. (Elizabeth Schneider, Hays Fellow 1972-1973 and Stephanie Wildman are the editors of the book.) She is also involved in several projects with local health care advocates, legal services lawyers and the ACLU.

In the fall semester, as chair of the Sheinberg Scholar in Residence Program, she helped to organize a law school program featuring Monica Roa, Program Director of Women's Link Worldwide. Roa brought the 2006 case that persuaded the Columbia Supreme Court that international human law required invalidation of a restrictive law against abortion. Sylvia continues to serve as a member of the board of Compassion & Choices, the Center for Reproductive Rights, and the Center for Law and Social Policy.

Helen Hershkoff. This year, Helen taught Civil Procedure, Federal Courts and the Federal System, and the seminar portion of the Hays seminar. She also taught two courses at the NYU@NUS graduate program in Singapore: Introduction to U.S. Legal Methodology, a required course for all students in the program, and U.S. Civil Procedure, an elective course. On the administrative front, Helen chaired the Lawyering Personnel Committee and convened the Procedure Area Group; she served as faculty supervisor to the *Journal of Legislation and Public Policy*, a student-run journal; and she sat on the Board of Directors of the Brennan Center for Justice, where she served on the Governance Committee and co-chaired the Program Committee.

In July 2008, Helen saw the release of a revised Ninth Edition of *Civil Procedure: Cases and Materials* (with Jack H. Friedenthal, Arthur R. Miller, and John E. Sexton), and in July 2009, a Tenth Edition of the casebook. Her essay on the enforcement of health and education rights in Brazil, India, Indonesia, Nigeria, and South Africa was published, see *Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings*, in *Courting Social*

Justice: Judicial Enforcement of Social and Economic Rights in the Developing World (Varun Gauri & Daniel M. Brinks editors, Cambridge University Press, 2008). Her essay on international public interest litigation was published in Volume 10, issue 1 of the Human Rights Review.

Helen also did public speaking, attended academic conferences, and mooted Supreme Court arguments. In September 2008 she presented remarks at the Association of the Bar of the City of New York in connection with its celebration of the seventieth anniversary of the decision in *Erie v. Tompkins*. In December 2008, she delivered a lecture at the Department of Comparative Law at the University of Florence, "Justiciability and the Horizontal Effect of Social and Economic Rights: Observations from State Constitutional Practice in the United States." In April 2009, she presented a paper at the Columbia Law School Human Rights Institute as part of its discussion of economic and social rights. In July 2009, she gave a talk at the ACLU as part of an oral history project. She helped moot arguments in three Supreme Court cases (all argued by NYU Law School graduates): *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), *Shinseki v. Sanders*, 129 S.Ct. 1696 (2009); and, *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009). She also signed on to two amicus curiae briefs: *Arar v. Ashcroft*, before the Second Circuit, concerning the rights of detainees, and in *Ashcroft v. Iqbal*, before the Supreme Court, on pleading standards.

Finally Helen did community and other professional service. In particular, she continued to serve on the Board of the Urban Justice Center, on the Advisory Board of the Association of Union Democracy, and on the Board of Party for Humanity. She also served on the Schools Committee of the Harvard Club of New York and interviewed high school students.

### 3. JAMES MADISON LECTURE.

The James Madison lecture is considered the leading annual lecture at NYU Law School. It was founded, in 1959, "to enhance the appreciation of civil liberty and strengthen the sense of national purpose." The lecturers are limited to U.S. Supreme Court justices and judges of the U.S. Courts of Appeals. Fourteen Supreme Court justices and 25 Court of Appeals judges have delivered Madison lectures. Norman has directed the Madison lectures since 1977, and it is administered as part of the Hays Program. The fall 2008 lecture on Affirmative Constitutional Litigation in Federal Courts was delivered by Judge Marsha Berzon of the U.S. Court of Appeals for the Ninth Circuit and the 2009 lecture will be delivered by Judge M. Blane Michael '68 of the Fourth Circuit.

### 4. THE FELLOWS' NEXT STEPS.

Jess Braverman will be working at Legal Aid Juvenile Rights. Vinay Harpalani will be the Derrick Bell Fellow, working at the Law School. Until August 2011, Ryan Hooper will be clerking for Judge Jerome B. Simandle of the United States District Court

for the District of New Jersey. Amy Kimpel is going to work for the Federal Defenders of San Diego, representing indigent clients accused of federal crimes. Lizzie Seidlin-Bernstein will be a litigation associate at Paul Weiss in New York. Molly Tack is clerking with Magistrate Judge Michael Doling in the Southern District of New York. In September 2009, Hays Fellows Molly Tack and Ryan Hooper will wed, at least the third Hays Program union.

#### 5. NEW FELLOWS.

In 2009-2010 the Fellows will be: Rachel Goodman (Roger Baldwin), Colin Reardon (Leonard Boudin), Alexa Rosenbloom (Robert Marshall), Amalea Smirniotopolous (Deborah Linfield), Laura Trice (Palmer Weber), and Alisa Wellek (Harriet Pilpel).

As in the past, the Fellows are selected following interviews by the Directors and Fellows on the basis of their demonstrated commitment to civil liberties, their public interest experience, and their academic qualifications.

Norman Dorsen  
Sylvia A. Law  
Helen Hershkoff

## **PLEASE KEEP IN TOUCH WITH THE HAYS PROGRAM**

We try to maintain up-to-date contact information for all Fellows. If your contact information has changed, please be sure to send us the new data.

Name

Home address

City

State

Zip Code

Email address

Phone number with area code

Organizational affiliation

Professional title if any

Business address

City

State

Zip Code

Email address

Phone number with area code