



**NEW YORK UNIVERSITY**  
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**ARTHUR GARFIELD HAYS CIVIL LIBERTIES PROGRAM**  
**ANNUAL REPORT 1999-2000**

The main news, once again, is the work of the Hays Fellows, and it was a very good year. But there was more than usual activity on other fronts.

While Sylvia was on sabbatical leave (in glorious Hawaii), Professor Holly Maguigan ably served as acting co-director with Norman. Since 1987, Holly has been a member of the NYU clinical law faculty, specializing in criminal defense and focusing on the defense of battered women who fight back. She did a wonderful job despite the handicap of a serious and slow-healing shoulder injury that she sustained in a bicycle accident.

The best longterm news is that Helen Hershkoff has agreed to become a co-director of the Program. Helen has been on the faculty since 1995, was formerly associate legal director of the ACLU, and before that a top Legal Aid attorney. She is the nation's leading advocate and scholar on the rights of poor people under state constitutions. See her recent article, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131 (1999). With her husband, Prof. Steve Loffredo of CUNY Law School, she wrote the 1997 edition of *The Rights of the Poor* in the ACLU handbook series that Norman edited for for more than 25 years. Helen is a magnificent teacher, lawyer, colleague and mentor who will be a great addition to the Hays Program.

We have sometimes referred in these reports to especially noteworthy achievements and events concerning Hays Fellows. This year we acknowledge three "local" academics, including two of our NYU colleagues, Steve Gillers (Hays Fellow 1967-1968) and Marty Guggenheim (Hays Fellow 1970-1971). Widely known to the public for his acute commentary on legal issues, especially ethical ones, Steve was named vice dean of the Law School in 1999, a post from which he plays an important role in the academic and administrative life of the School. Marty has been director of the Law School's excellent and continually improving clinical program for many years. Moreover, he has maintained an enviable record of scholarly production. His extensive review of Elizabeth

Bartholet's *Somebody's Children: Abuse and Neglect, Foster Draft, and the Adoption Alternative*, 112 Harv. L. Rev. 1716 (2000), is a must read for anyone who cares about children and families. In addition, *Battered Women and Feminist Lawmaking* by Elizabeth Schneider of Brooklyn Law School (Hays Fellow 1972-1973), will be published in October by Yale University Press, which has nominated the book for a Pulitzer Prize and the National Book Award.

The 1999-2000 Hays Fellows were Ilizabeth Gonchar (Deborah Linfield Fellow), Sheryl I. Harris (Tom Stoddard Fellow), Vida B. Johnson (Robert Marshall Fellow), Zachary Katznelson (Palmer Weber Fellow), Shina Majeed (Roger Baldwin Fellow), Sejal R. Zota (Boudin Fellow).

## THE FELLOWS

The work of the Fellows is largely driven by their individual interests. In August and January dozens of public interest lawyers submit proposals to us seeking a Fellow to work with them. The demand for committed, talented help in public interest work always outstrips the supply and, inevitably, most of those who request our help are disappointed.

The supervising lawyers provide great projects and guidance, and the Fellows contribute valued work. Many Hays supervisors have become regulars. By word of mouth students learn of good placements. It is a special joy when a former Fellow supervises a current student. We appreciate these ongoing relations, and always welcome the opportunity to add new placements or revive older ones. At our regular meetings, each Fellow and his or her supervising attorneys lead a discussion of a current civil liberties case on which they have collaborated.

We encourage Fellows to work at the jobs, and with the people and organizations, they find most attractive, with two important qualifications. First, we generally insist that Fellows take on different assignments in the fall and the spring. We also encourage people to work with organizations and on at least one issue that is new for them. These restrictions on completely free choice reflect our considered view that the Hays Fellowship is a special opportunity for Fellows to be exposed to a range of issues and public interest practice styles.

The work varies year to year. In 1999-2000, the Fellows engaged a wide range of civil liberties issues but, unlike earlier generations of Hays Fellows, no one tackled issues of women's rights, reproductive freedom, death penalty, or the rights of people with disabilities.

## FIRST AMENDMENT

Ilizabeth Gonchar, the Deborah Linfield Fellow, which is specially concerned with freedom of speech and the press, worked for the Media Access Project (MAP), based in Washington, D.C. She analyzed FCC regulations which require issue ad sponsors to identify themselves on the ads. MAP is interested in strengthening the interpretation of these rules or having the FCC promulgate

stronger rules to ensure that the real sponsor is identified and not just a superficial committee. Gonchar prepared an extensive memo addressing conflicting constitutional concerns. It examined the Supreme Court's decision in *McIntyre v Ohio*, 514 U.S.334 (1995), invalidating identification disclosure requirements for handbills and flyers and concluded that the case is not necessarily controlling in the broadcast context. Gonchar said that while the focus of her work "was not on traditional First Amendment free speech principles, the core justification behind the FCC rules is the right to hear and be informed -- First Amendment interests that are often underrated. The topic also seemed quite timely given the relationship between issue ad regulation and the hot topic of campaign finance reform." Gonchar's work was supervised by Andrew Schwartzman and Gigi Sohn.

## IMMIGRANTS' RIGHTS

Sejal Zota, the Boudin Fellow, worked on issues of immigrants' rights in both semesters. In the fall she worked with Manny Vargas at the Criminal Defense Immigration Project of the New York State Defenders Association. She researched legal remedies for individuals threatened with deportation as a consequence of a New York youthful offender adjudication. She prepared memos on the confidentiality provisions of the youthful offender law and explored the circumstances in which such records could be unsealed. She prepared a memo exploring the possibility of litigation against New York City and State to prevent authorities from giving sealed records to the INS.

In the spring, Zota worked with former Hays Fellow Judy Rabinowitz (1984-85) at the ACLU Immigrants' Rights Project. Judy has led the national effort to challenge indefinite detention of immigrants who are not able to return to their country of origin. She has brought cases arguing that such policies violate federal statutory law and deny both substantive and procedural rights protected by the constitution. Zota's work focused on preparing procedural challenges to indefinite detention, seeking to learn precisely how the policies are implemented. She gathered evidence, through interviews with advocates and FOIA requests, to support a petition for rehearing in a Tenth Circuit decision rejecting a substantive due process challenge to current INS policies.

Thanks to the Hays Adolph Fund, which supports travel by Fellows related to their work, Sejal Zota was able to attend meetings in Washington, DC on behalf of the ACLU Immigrants' Rights Project.

## CREDIT FRAUD

In the fall, Zachary Katznelson worked for the New York State Attorney General, Civil Rights Bureau, under the supervision of Assistant Attorney Generals Lisa Landau and Tanya Washington. He helped to prepare for and participated in settlement negotiations among the AG, Delta Corporation, a mortgage lender, and various brokers that did business with Delta. The AG's suit accused the companies of predatory lending practices. Delta settled quickly, but the suits

against the brokers continued. In response to discovery requests by the brokers, Katznelson researched and wrote a memo exploring whether or not documents obtained through the investigation of Delta were privileged. He examined whether federal or state law governed in the discovery dispute and what type of privilege could and should be asserted.

## ENVIRONMENTAL JUSTICE

In the spring semester, Elizabeth Gonchar worked for the Natural Resources Defense Council (NRDC), under the supervision of Mitch Bernard (Hays Fellow 1978-1979). Her main project involved researching preliminary injunction law in New York and the requirement that plaintiff's obtaining preliminary injunctions post undertakings. A recent court decision required a indigent plaintiff to make a \$500,000 undertaking, which meant that they were unable to retain a preliminary injunction won on the merits and thus effectively denied judicial relief. Liz's memo considered statutory and constitutional arguments for permitting New York judges to require nominal bonds. She plans to continue work on this project, turning the memorandum into a draft brief and perhaps an article.

Gonchar worked on other projects for the NRC. She did research on a new legal strategy for pursuing manufacturers of certain chemicals especially pesticides, which can be traced in a person's body even though the causal relationship to harms is not yet known. She researched state battery and trespass of the body claims, physical occupation takings, and bodily integrity cases. She also considered preemption issues, injunction possibilities for battery claims, and medical monitoring claims. Gonchar's work at the NRC also included participation of projects to regulate diesel buses, sanitation truck pollution concerns, and interviewing homeless families regarding the city's failure to provide them Medicaid-required assistance for asthma.

In the fall Baldwin Fellow Shina Majeed worked for the Center for Constitutional Rights on a case asserting that Chevron was complicit in the death of two protesters in an incident on an offshore oil platform in May 1998, and for attacks on residents of two near-by towns in 1999. She prepared a memorandum on whether it was possible to add a subsidiary or holding company of Chevron as a defendant under Rule 15 of the Federal Rules of Civil Procedure. In addition, she researched whether prior inconsistent statements by defendants in their declarations could be relied upon for purposes of summary judgement and would create a genuine issue of material fact such that plaintiffs would survive a motion to dismiss. Her work was supervised by Judith Chomsky of Philadelphia and Jennie Green of CCR.

## POLICE MISCONDUCT

In addition to the credit fraud work described above, in the fall semester Zack Katznelson participated in the New York Attorney General's investigation of the NYPD's stop and frisk practices. He reviewed police training procedures, both for new recruits and for veterans, read

training manuals, visited the police academy to participate in training, questioned academy personnel, interviewed police training experts to determine how well New York measured up to national standards, and examined police anti-drug operations. He wrote and edited portions of a report published by the AG detailing the deficiencies in current NYPD practices, including portions outlining how the discriminatory stops violate equal protection.

## HATE CRIMES

Sheryl Harris worked for the National Gay and Lesbian Task Force Policy Institute in the fall semester, under the supervision of Sean Cahill. In preparation for a national conference on hate-motivated violence, she prepared an extensive review of existing research on violence against lesbian, gay, bisexual and transgendered people. She surveyed hundreds of books and articles, and ultimately reviewed in detail six books and eighteen articles and also compiled an appendix of empirical studies and statistical findings.

## PRISONER'S RIGHTS

Marshall Fellow Vida B. Johnson worked on the claims of New York prisoners who request protective custody because they believe that their lives are in danger, are denied such protection and are subsequently severely injured by fellow prisoners. She worked for the law firm of Elizabeth Koob and Joan Magoolaghan, and her work was directly supervised by Jenny Huang, Hays Fellow 1995-1996. Johnson prepared a memorandum on the exhaustion requirements of New York's Prisoner's Litigation Reform Act, researched regulations and cases governing protective custody in New York, corresponded with potential clients by e-mail, and drafted several versions of a complaint.

Shina Majeed also did prisoners rights work with Koob & Magoolaghan. In the spring semester she worked on a federal case brought by a youth resident of a detention facility who was rendered unconscious and permanently brain damaged when facility staff subjected him to excessive restraint. She researched and wrote several memos on plaintiff's Eighth and Fourth Amendment claims, and drafted sections of a reply brief to defendant's summary judgment motion, including sections on absolute immunity and on excessive force under the Fourth, Eighth and Fourteenth Amendments.

## POVERTY LAW

In the spring semester Zack Katznelson worked with the Brennan Center for Justice as part of a group developing living wage legislation for New York City. He was supervised by Paul Sonn, a staff attorney. Katznelson researched and wrote extensive memos on two issues. He examined the ability of the City to regulate, and thus impose a living wage requirement upon, quasi-

independent governmental public benefits corporations, such as the City University of New York, the Health and Hospitals Corporation, the New York City Housing Authority, and the Board of Education. He examined over 60 different entities, exploring the legal authority for direct regulation, attaching conditions to agency appropriations, and amending contracts between the city and various agencies to include a living wage requirement. He also explored the power of the city to attach conditions to leases (such as the Port Authority's agreement to run the city's airports), concessions (such as those at Yankee and Shea Stadiums and city parks), and franchises (such as Time Warner's to provide cable in certain neighborhoods). Second, he explored enforcement options for a living wage requirement. He reviewed existing enforcement schemes for labor and human rights legislation on the state and local level, the right to trial by jury under the New York State Constitution, and the right to collect attorney's fees. Applying this research, he proposed administrative and judicial remedies for people harmed by employers paying sub-living wages.

## FAMILY LAW

In the spring semester Vida B. Johnson worked with the Legal Aid Society's Juvenile Rights Division, Special Litigation Unit, representing foster families threatened with destruction under the federal Adoption and Safe Families Act (ASFA) and New York's response to it. The law prohibits people who have been convicted of specified felonies from being foster or adoptive parents. While motivated by legitimate concerns, New York's version of the law encompasses more felonies than mandated by the federal law. As a practical matter, New York requires that children be removed from the only family they know because of old drug and robbery convictions. The Legal Aid Society has filed a challenge to New York's law. Johnson digested masses of materials on the impact of the law obtained through discovery, prepared memos on class certification and the "government operations" doctrine, and drafted a response to one defendant's motion to dismiss. The review essay by Marty Guggenheim, referred to above, bears heavily on this issue.

## EMPLOYMENT DISCRIMINATION

Sheryl Harris worked for the National Employment Law Project (NELP) on two major litigation projects. The first is a class action suit for violations of wage and hour laws on behalf of over 500 mostly West African immigrant grocery delivery workers against their employer delivery companies and the grocery stores and pharmacies that use their services. The workers charge that they are not paid a minimum wage, not paid overtime, and are denied employer-paid payroll benefits, such as Social Security and unemployment insurance. In addition, several workers lost their jobs for participating in a strike to protest their wages and hours. She reports, "The suit is particularly exciting because it seeks to hold both the delivery companies and the stores responsible as 'employers' under the Fair Labor Standards Act, using precedent set in NELP's previous litigation against garment sweatshops." Harris researched the rules in the Southern District of New York for obtaining class certification, and court-ordered opt-in procedures for bringing collective actions under the FLSA.

Harris worked on another class action in Ohio, on behalf of newspaper carriers who were wrongly classified as independent contractors by the newspaper company and thereby required to pay their own taxes and benefits, including Social Security and unemployment insurance. Plaintiffs original claims of fraudulent misrepresentation, negligent misrepresentation and breach of the covenant of good faith and fair dealing were dismissed. Harris searched for alternative contract theories to enable the plaintiffs to be released from their contracts and to receive damages, including unconscionability, undue influence, constructive fraud, duress, unenforceability on public policy grounds, and adhesion.

## THE DIRECTORS

Norman Dorsen continued his service with several public interest organizations, primarily the Lawyers Committee for Human Rights, where he finished a four year term as chair of the board of directors in January. 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 continuing struggle to prevent a constitutional amendment to permit punishment of "desecration" of the American flag. Jay Ward Brown, Hays Fellow 1991-1992, who is practicing law in Washington, DC, worked closely with Norman on this issue this year as the amendment again came to a close vote in the Senate. Norman also continued as the first president of the U.S. Association of Constitutional Law, and he was elected to the executive committee of the International Association of Constitutional Law. His travels this year took him to England, Italy, France, the Netherlands, Portugal and the Czech Republic (can't he have a little fun?).

As previously reported, Norman chaired the committee that planned NYU's Global Law School Program and he has headed it since. In that capacity he helped organize several international conferences and participated in others. The largest was NYU's co-sponsorship with the Library of Congress, which celebrated its bicentennial, with a four day meeting on Democracy and the Rule of Law in a Changing World Order, which included five U.S. Supreme Court Justices. Sessions were held at both the Library and NYU Law School, and addressed nine major issues, including violations of basic human rights, the roles of women, conflicts over environmental resources, and democracy in multi-ethnic and multi-racial states. A book on the conference that Norman is co-editing will appear in 2001. He participated in conferences on comparative constitutional law at Lisbon and NYU. Norman also continued to direct the James Madison lecture series (as part of the Hays Program) in which federal appellate judges address a topic relating to civil liberties; last year's lecturer was Judge Martha Daughtrey of the U.S. Court of Appeals for the Sixth Circuit, who spoke impressively on Women and the Constitution.

Norman's scholarly output has diminished in recent years under the weight of administrative duties, first when he was ACLU president and now as chair of NYU's Global Law School Program. But he delivered a tribute to Professor David Cole in *The American Lawyer's* issue honoring 40 lawyers under 40 years of age, and he delivered one of the tributes to former Senator George

Mitchell, the 2000 dedicatee of Annual Survey of American Law. He also wrote the foreword to the published version of a fall 1998 symposium on Constitutionalism, Constitutional Rights and Changing Civil Society, sponsored by the U.S. Association of Constitutional Law. See 21 Cardozo L.Rev. 1041 (2000).

Sylvia also had a busy year. She published an article, Commercial Sex: Beyond Decriminalization in the University of Southern California Law Review. She is now working to transform it into a popular book. If you would like a reprint, just ask. She also published a tribute to her major mentor besides Norman, the late Edward V. Sparer, in the American Lawyer magazine.

Sylvia was on sabbatical this academic year, visiting at the William S. Richardson Law School at the University of Hawaii. She went to study Hawaii's health care financing system which has often been described as the best in the United States. She wrote an analysis of the Hawaii program that soon will be published in the American Journal of Law and Medicine. In the course of this work she learned that Hawaii does worse than most states in providing health services to poor people, particularly children, and that the insurance company that monopolizes the private health insurance market engages in abusive practices and has never been subject to state regulation. Working with progressive health care providers and advocates, including the ACLU of Hawaii and Healthy Mothers, Healthy Babies, she helped organize efforts to address these problems and achieved some success.

On a less happy note, Jordan Derwin, Hays Fellow 1958-1959, passed away in early January. Jordan was in the first class of Fellows, a couple of years before Norman arrived, and he consistently supported the Program while fashioning a valuable career as an official of the national and local units of the American Federation of Television and Radio Artists.

John Edward Smith, Hays Fellow 1962-63, died in Florida about two years ago. On February 18, 2000, there was a special memorial for John Edward in Miami, where he had lived, in recognition of his exceptional pro bono work on behalf of poor and other disadvantaged people while he was a partner in Steel Hector & Davis, a leading law firm. Attorney General Janet Reno delivered the principal tribute.

## ADMINISTRATION

We have continued to work out the details of our new program to pay part of the cost of bar review courses for Fellows going into public interest work. This year five Fellows received such financial support.

We received interviewing help and wise judgment in selecting the 2000-2001 Fellows from Helen Hershkoff and from Kim Hawkins, Hays Fellow 1992-1993 and currently a Lawyering Instructor at NYU Law School.



We continued the program of inviting former Fellows to spend an evening with the current Fellows. In the full semester, our guest was Joan Bertin, Hays Fellow 1972-1973, executive director of the National Coalition Against Censorship and former ACLU staff attorney in the Women's Rights Project. In the spring David Rudovsky, Hays Fellow 1966-1967, a national leader of the criminal defense bar and a faculty member of Pennsylvania Law School, met with the Fellows. Both evenings were of great interest as the former Fellows discussed 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 Program now has seven Fellowships that are fully funded. Above all, we are grateful to the scores of former Hays Fellows who have supported the Program and 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

In September, 2000, Elizabeth Gonchar will work as a Fellow at the NOW Legal Defense and Education Fund. Sheryl Harris is anticipating public interest employment in San Francisco. Vida Johnson will be a Prettyman Fellow at Georgetown Law School. Zach Katznelson will be clerking for U.S. District Judge Marilyn Patel in San Francisco. Shina Majeed will be clerking for U.S. District Judge Gladys Kesser in the District of Columbia. And Sejal Zota will be working as a Kirkland and Ellis Fellow for the Criminal Defense Project of the New York State Defenders Association.

The Hays Fellows for 2000-2001 are Diana Kasdan (Harriet Pilpel-Planned Parenthood Fellowship), David Milton (Robert Marshall Fellowship), Anjana Samant (Roger Baldwin Fellowship), Michelle Solomon (Deborah Linfield Fellowship), William Sothern (Palmer Weber Fellowship), and Colin Stewart (Tom Stoddard Fellowship).

Norman Dorsen  
Sylvia A. Law

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