

September 2, 2003

ARTHUR GARFIELD HAYS CIVIL LIBERTIES PROGRAM
ANNUAL REPORT 2002-2003

As always, the magnificent work of the Fellows forms the heart of the Hays Program. A special highlight this year was the celebration of the 45th Anniversary of the program on May 17, 2003. The best parts of this wonderful day were dozens of conversations among old friends and connections with new ones.

After lunch, Fellows engaged in two panel discussions. Director Helen Hershkoff led a lively dialogue on "The Civil Liberties Issue on Which My Views Have Changed Most Since Law School." Andy Dwyer '90, Lee Michaelson '83, Ronnie Pollack '68, and Dennis Riordan '74 shared wit and insight. Our newest Hays Director, Michael Wishnie, moderated a panel that included Kim Barry '98, Eric Lieberman '72 LL.M., Marcia Lowry '69, and David Rudovsky '67, which discussed "The Matter I've Worked on That Has Had the Biggest Effect On My Civil Liberties or Political Views." At dinner we heard from two inspiring civil liberties leaders: Anthony Romero, the Executive Director of the American Civil Liberties Union, and Katha Pollitt, a columnist for The Nation.

Sylvia, Helen, and Mike organized a surprise tribute to Norman that included a tape of comments by Judge James L. Oakes of the Second Circuit; Dieter Grimm, a former judge of the Federal Constitutional Court of Germany; Professor Thomas Franck of NYU Law School; Ira Glasser, former Executive Director, ACLU; Judge Stephen R. Reinhardt, of the Ninth Circuit; Ramona Ripston, Executive Director of the ACLU of Southern California; and Justices Stephen G. Breyer and Ruth Bader Ginsburg of the U.S. Supreme Court. Norman was surprised, to say the least, and deeply grateful. Let us know if you would like a copy of this moving tribute.

A second highlight of the year was that Michael Wishnie became a tenured professor in NYU's Clinical Faculty and a Co-Director of the Hays Program. Mike is a world class teacher and one of the nation's leading scholars and activists on the rights of immigrants and of low wage workers. He came to NYU from Yale, a clerkship with Justice Breyer, and work at the ACLU Immigrants' Rights Project. The fact that we now have four directors should not imply that anyone is contemplating retirement or inactivity. Rather, commitments by directors to other projects and sabbaticals will not require the use of acting directors.

We always take an active interest in the activities of former Hays Fellows. For the second year we are including with the annual report news from several former Fellows about their work and lives. We hope it is of general interest. We know that a large number of Fellows have also made major contributions—for example, on June 10, 2003, the New York Times Op-Ed page included essays by two former Hays Fellow, Steve Gillers '68, and Judith Resnik '75. But the annual report includes only the reports on the forms we distributed last year. Another form is included with this report, which we urge Fellows to complete for inclusion next year.

As usual, the important news of the Hays Program is reflected in the work of the Hays Fellows.

1. THE FELLOWS

The Hays Fellows in 2002-2003 were: Melissa Goodman (Harriet Pilpel Fellow), Benita Jain (Roger Baldwin Fellow), Gabrielle Prisco (Leonard Boudin Fellow), John Daniel Radice (Palmer Weber Fellow), Kathryn Sabbeth (Robert Marshall Fellow), and Priyamvada Sinha (Deborah Rachel Linfield Fellow).

The Fellows' work is largely driven by their individual interests. Each August and January dozens of public interest lawyers submit proposals to us seeking a Hays Fellow to work with them. The demand for committed, talented help in public interest work always outstrips the supply, and regrettably most applications must be denied. 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 it works out that 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. During the year, at our regular meetings, each Fellow leads a discussion of a current civil liberties case on which he or she has worked.

We generally insist that each Fellow take on different assignments in the fall and the spring. We also encourage Fellows to work on at least one issue that is new to them. These restrictions on 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. Fellows are selected on the basis of their demonstrated commitment to civil liberties and their legal abilities. Virtually all are involved in a wide range of public interest work, in addition to their Hays responsibilities and academic commitment.

This year's Fellows sought opportunities to work together. As explained below, in the fall semester two Fellows worked with Judy Rabinovitz '85, and in the spring, four Fellows worked with Mike on a collective project that reconnects with the early years of the Hays program when Fellows regularly worked with Norman on constitutional cases. We are seeking to find the right balance between offering Fellows the opportunity to connect with public interest organizations and making a special contribution through our own collective work.

It is a sign of the times that a vast portion of the Fellows' work this year focused on the defense of immigrants and prisoners. In addition, Fellows participated in cases involving the First Amendment, women's rights and other civil liberties matters.

A. Rights of Immigrants

In the fall Benita Jain and John Radice worked with former Hays fellow Judy Rabinovitz at the ACLU Immigrant Rights Project, assisting with legal research and briefing in *Demore v. Kim*. Judy represented Kim in a case challenging immigration laws that require mandatory pre-trial detention of immigrants in deportation proceedings involving people who have been convicted of a wide range of crimes. Under the law, passed as part of broader anti-immigrant legislation in 1996, tens of thousands of people have been jailed by the INS during the pendency of their removal (deportation) proceedings with no opportunity to even apply for bond. Judy argued the case before the Supreme Court on January 15, with Benita, Melissa, and Mike in attendance. On April 29, the Court rejected her arguments.

Benita poured through legislative history cited by the Court in other detention cases and compared post-conviction release requirements in criminal proceedings with the immigration mandatory detention law. John says that "even though this was a case that Judy had won in several circuits, this did not mean that there was any shortage of work. I felt like I was making meaningful contributions at several different stages: from researching the legislative history of the statute, to writing about specific issues in memos that were incorporated in the brief, and finally to cite- and consistency-checking the brief as the filing date approached. Traveling to Washington to watch Judy argue this case that everyone had spent so much time and effort on was certainly a highlight of this extraordinary opportunity."

In the spring of 2003, four Hays Fellows, Melissa Goodman, Benita Jain, Gabrielle Prisco and Kathryn Sabbeth re-engaged an older Hays model of collective work. The Fellows were motivated to join forces by a desire to work directly with each other, and in the selection of a particular project by the intense post-September 11 attack on civil rights and civil liberties, particularly in immigrant communities. Their work had three main components.

First, the four Fellows joined Director Mike Wishnie, a group of NYU 1Ls and other attorneys who were developing litigation to challenge U.S. Department of Justice efforts to enlist state and local police in the routine enforcement of federal immigration laws, including the unauthorized entry by the FBI of civil immigration information into the federal criminal NCIC database. The Fellows immediately assumed a leadership role, researching legal claims, preparing responses to anticipated government motions, conducting outreach to potential plaintiffs, drafting the complaint, and coordinating a legislative and media strategy with national immigration advocates in Washington.

The second component of the placement included working with a grassroots organization, the Coney Island Avenue Project (CIAP), to counsel individuals who may have been subject to the administration's "Special Registration" program, which required immigrant men from 25 countries, predominantly Arab or Muslim, to report to INS and undergo degrading interrogation and fingerprinting. The Fellows also accompanied CIAP staff to interview unrepresented post-September 11 detainees held in county jails in New Jersey, and then wrote up legal analyses of the cases for referral to pro bono attorneys.

Finally, the four Fellows drafted a model brief in support of motions to suppress and to terminate removal proceedings for persons arrested upon complying with the special registration program, on the grounds that the program impermissibly discriminates on the grounds of race, religion, and ethnicity. The National Lawyers Guild National Immigration Project has distributed the brief to immigration attorneys and lay advocates around the country.

B. Rights of People Convicted of Crimes.

In the fall Kathryn Sabbeth worked at the NAACP Legal Defense and Educational Fund, Inc. on *Hayden v. Pataki*, a class-action lawsuit challenging New York State's disenfranchisement of felons and ex-felons. When Norman Chachkin, Litigation Director at LDF and Hays Fellow 1967, brought Kathryn in on the project, LDF was in the process of amending the complaint to focus on several claims: New York State's disenfranchisement statute, N.Y. Election Law § 5-106(2), was enacted with the intent to deprive Blacks of the right to vote, it disproportionately denies the right to vote to Blacks and Latinos, and the disproportionate disenfranchisement of Blacks and Latinos dilutes the voting strength of New York's minority communities. Kathryn researched the legislative history of the New York State Constitution and its disenfranchisement statute. Drawing on this research, Kathryn drafted a key section of the complaint which detailed the history of racial discrimination in New York's voting laws. The amended complaint was filed in the Southern District of New York on January 15, 2003.

During the fall, Priyamvada Sinha interned at Koob & Magoolaghan, a private law firm with special expertise in civil rights practice areas, including prisoners' rights. Pri assisted in a potential case involving the First Amendment rights of individuals in a juvenile detention center to communicate with the press and other civilians. She also researched possible First Amendment issues surrounding a case of denial of parole in New York State.

In the spring, Pri worked at the Civil Action Project of the Bronx Defenders. Based in a public defender's office, this project strives to provide comprehensive direct legal services to clients and their families by integrating civil representation with the office's criminal defense practice. The project also identifies and pursues challenges to systemic, unfair, or discriminatory practices in criminal justice matters on a case-by-case basis. During this internship, she assisted in investigations, interviews, legal and non-legal research, writing a portion of a motion, and developing theories of the case for clients with civil legal and administrative concerns.

In the spring John Radice worked with NYU alumnus Alex Reinert and Katie Rosenfeld at Koob & Magoolaghan. At K & M John was included in every part of various cases, from legal research to drafting complaints to visiting a prison that was the site of a wrongful death action that K & M is pursuing. John is interested in privacy and technology, so a case challenging a state law demanding collection of DNA information on convicted felons allowed him to satisfy his interests in a practical setting. He reports that, "the internship at K & M represents some of the most interesting work I participated in at law school, and I am so thankful that I had this experience."

C. First Amendment:

In the fall, Gabrielle Prisco worked at the National Coalition Against Censorship (NCAC) with Joan Bertin, Hays Fellow 1973. The NCAC spearheads a broad coalition whose primary goal is the protection of the First Amendment. NCAC works with educators, artists, writers, lawyers, students and activists to fight censorship and protect the freedom of speech and its attendant values. During her fellowship at NCAC, Gabrielle engaged in direct advocacy and legal research. She wrote letters, conducted research and advocated on behalf of a high school English teacher who was being disciplined by his school's administration for assigning a Russell Banks novel to a student as an extra-credit assignment. She also researched obscenity laws in the context of the F.C.C. and broadcasting to help prepare Joan for a debate on National Public Radio. She also read and analyzed a wide range of materials in order to create a new feature of the NCAC website which will allow visitors to track all recent and current Supreme Court cases dealing with the First Amendment.

D. Women's Rights and Reproductive Freedom.

In the fall, Melissa Goodman worked with Jennifer Dalven at the ACLU Reproductive Rights Project, helping to develop a legal challenge in three states to Wal-mart's refusal to stock and fill prescriptions for emergency contraceptives. Given the difficulties of bringing a private action based on pharmacy related statutes and regulations, it is probable that the research will be used to try to convince the State Attorney General of Maine to bring an action against Wal-Mart. Melissa's second project involved research in preparation for an immediate challenge to the "Partial Birth Abortion" ban pending in Congress. She prepared memoranda on criminal intent as applied to a doctor performing certain types of abortion procedures, certain procedural issues including venue, services, and proper plaintiffs, and plaintiff anonymity. She also did research on the substantive due process rights of parents based on biology alone for an ACLU Board debate and surveyed Establishment Clause case law as it related to public funding of religious hospitals.

On the emergency contraception project, Melissa worked with Diana Kasdan, Hays 2001. She reports that, "Diana is a wonderful supervisor who gave me detailed feedback and encouragement."

2. THE DIRECTORS

Norman Dorsen. By the beginning of the academic year Norman was working steadily after his April 2002 heart surgery, dividing his time between acting as counselor to the new president of the university, John Sexton, and his law school duties. At the University, after completing work as chair of the president's transition team and organizing the academic component of John's September 2002 installation, he is chairing the decennial reaccreditation process that every university must undergo. The focus of NYU's effort is a comprehensive study of undergraduate education at the eight schools that teach undergraduates. He also supervises the new Vilar Global Fellowship Program in

performance studies (acting, dance, film, music composition, etc.).

At the law school Norman was officially on sabbatical and therefore did not teach. But he continued with the Hays Program, co-authored a casebook on Comparative Constitutionalism, and served as editorial director of *I*CON*, a new international journal on comparative constitutional law, which he founded. He also published tributes to four leading figures: the late Professor Gerald Gunther, in 55 *Stan. L. Rev.* 657 (2002); Professor Laurence Tribe, in 59 *NYU Ann. Surv. Am. L.* 3 (2003); and Dean (as he then was) John Sexton, in the *NYU Law Magazine* and (forthcoming) in the 2004 *NYU Annual Survey of American Law*; and Aryeh Neier (in a pamphlet of tributes). And he is serving as counsel to former ACLU leaders submitting an amicus curiae brief in support of the campaign finance law in McConnell v. Federal Election Commission, which will be argued in the Supreme Court in September. (This brief is in opposition to the official ACLU position against regulation of campaign finance.)

Sylvia A. Law also had a busy year. She has continued her work on reproductive freedom issues, serving on the Board of the Center for Reproductive Rights (CRR), formerly the Center for Reproductive Law and Policy ("CLRP"). In 2002, NARAL eliminated "rights" from their name, while the Center added it. CRR is the primary legal counsel to the movement for reproductive choice, both in the United States and around the world. In 2002, when Janet Benshoof, the Founder and President of CLRP, resigned, Sylvia chaired the search committee that found Nancy Northrup, formerly Legal Director of the Brennan Center at NYU, to lead the CRR. Congress is near agreement on a ban on the so-called "partial birth abortion." Choice issues dominate debates on the confirmation of judges. Internationally, the CRR documents and challenges practices, such as forced sterilization and abortion in Eastern Europe, that violate basic human rights norms. More concretely, Sylvia is leading the effort to strengthen the CRR Board.

Sylvia worked on related issues of choice at the end of life, as a board member of the Compassion in Dying Federation, and as legal advisor to that group. Last year, a federal district court in Oregon rejected Attorney General John Ashcroft's effort to use the federal Controlled Substances Act to thwart Oregon's Death with Dignity law. Sylvia worked with the legal team to persuade the Ninth Circuit that the Ashcroft directive is illegal and will have adverse consequences for pain care at the end of life. She also spoke on these issues in Oregon at the anniversary of their law, at the New York City Bar Association, at the New School for Social Research, and at the national Health Law Teachers conference. She is working with the New York Compassion in Dying group to reform the law on pain and choice at the end of life.

Sylvia published two articles. *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 *U. Cin. L. Rev.* 367 (2002) and *Do We Still Need a Federal Patients' Bill of Rights?*, 3 *Yale J. H. Pol'y, L. & Ethics* 1 (2002).

Helen Hershkoff. After a semester visiting at Columbia Law School, Helen returned to teach Procedure to first-year students and a new Advanced Civil Procedure course to upper-level students.

She chaired the Lawyering Personnel Committee, participated in the Root-Tilden scholar selection committee, and also helped in the search for a new dean of public interest law. As in prior years, she met with Hauser Global Fellows to talk about public interest law.

Helen's lecture, *Positive Rights and the Evolution of State Constitutions*, was published at 33 Rutgers L. J. 799 (2002). She also co-authored a piece with Benedict Kingsbury for a symposium on education reform, Crisis, Community, and Courts in Network Governance, to be published in volume 28 of the New York University Review of Law & Social Change. Helen continued work on a project involving private bills. She was invited to join Jack Cound, Jack Friedenthal, and Arthur Miller on their influential civil procedure casebook. Finally, Helen is working on a book on comparative civil procedure and, thanks to the NYU-Oxford Program, was able to meet in London with her co-authors; Oscar Chase of NYU; Vincenzo Varano of Florence; Yasuhei Taniguchi of Tokyo; and Adrian Zuckerman of Oxford.

Among her community activities, Helen served on the Board of Directors of the Urban Justice Center and also the Brennan Center for Democracy. In addition, she is working with David Tobis of the Fund for Social Change to design an awards program for "acts of courage" that promote positive social change.

Helen will be on sabbatical during 2003-2004. In the fall, she will be a Visiting Fellow at the European University Institute in Florence.

Michael Wishnie. After a year spent on research leave and teaching in China, Mike returned to co-directing the Immigrant Rights Clinic (IRC) at NYU. This year, IRC students and a clinical fellow working under his supervision handled seven wage-and-hour cases in federal court, three deportation cases, and two Freedom of Information Act (FOIA) cases, as well as a number of non-litigation matters on behalf of grassroots immigrant organizations. Highlights included excellent work by Hays Fellows: Benita Jain winning the first decision in the nation terminating deportation proceedings on the grounds that INS had violated its rules regarding intervention in labor disputes, in this case by raiding a Manhattan garment factory based on the employer's retaliatory tip; Melissa Goodman serving as legislative counsel to Domestic Workers United, which prevailed on the City Council and Mayor Bloomberg to enact legislation strengthening protections for domestic workers referred by city-licensed employment agencies. Two incoming Hays Fellows also made contributions. Kevin Lapp helped to litigate a Thirteenth Amendment claim by a Filipina domestic worker against her former employers and Karuna Patel worked on RICO, international labor law, and wage-and-hour claims on behalf of two Mexican workers against the largest landscaper in Dutchess County, and then negotiating a favorable settlement for her clients.

At NYU, Mike chaired the clerkship committee, served as faculty advisor to the NYU Review of Law & Social Change annual symposium on immigrant labor issues, participated in the Root-Tilden scholarship program, International Court of Justice trainee, and Global Public Service Scholarship selection committees, and continued as faculty liaison to the Migration Policy Institute at NYU. As part of an ongoing exchange with a labor law clinic in Guangzhou, China, he also

hosted a seven-person delegation for a weeklong residency at the Law School.

Outside NYU, Mike gave a number of talks on civil and labor rights for immigrants, including speaking at Columbia (twice), Penn (twice), and Cardozo Law Schools, the New York City Bar, CUNY Graduate Center, NY Association of Independent Schools, and the Labor Law Group. He continued his service as a Trustee of the Yale-China Association and litigated two cases as a cooperating attorney for the ACLU, one a First Amendment challenge to Albany's parade permit rules (on behalf of a Chinatown labor group denied a permit) and the other a FOIA lawsuit seeking release of the Department of Justice's secret new policy on state and local police enforcement of immigration laws. Mike published *Immigrants and the Right to Petition*, 78 N.Y.U. L. Rev. 667 (2003) and *Introduction: Immigration and Federalism*, 58 N.Y.U. Ann. Surv. Am. L. 283 (2002), and co-authored a book-length report on post-September 11 immigration measures, *America's Challenge: Domestic Security, Civil Liberties, and National Unity After September 11* (MPI: 2003) and *Authority of State and Local Officers to Arrest Aliens Suspected of Civil Infractions of Federal Immigration Law*, 7 Bender's Immigr. Bull. 944 (2002).

3. JAMES MADISON LECTURE

This lecture series was founded in 1959 at NYU School of Law "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. Court of Appeals, with the exception of the 2000 lecture, which was delivered by the Lord High Chancellor of Great Britain in commemoration of the 40th anniversary of the first lecture and the importance of global legal studies. All told, 14 Supreme Court justices and 18 Court of Appeals judges have delivered Madison lectures.

Norman has directed the Madison lectures since 1977, and the lectures are administered as part of the Hays Program. The fall 2002 lecture was delivered by Judge Guido Calabresi of the U.S. Court of Appeals for the Second Circuit, a former dean of Yale Law School, on "The Federal Courts in a Federal System: Reestablishing a Madisonian Balance." The 2003 lecturer will be Judge David Tatel of the U.S. Court of Appeals for the D.C. Circuit.

4. MISCELLANEOUS

Over the years the Hays Program has held special events of public interest. Last year, on September 23, 2002, the Program sponsored a lecture by Robert Badinter, a French Senator and former Minister of Justice and president of the French Constitutional Court, who spoke on Victor Hugo and the abolition of the death penalty in France. The Alliance Française USA co-sponsored the event, which was attended by a large number of faculty and students from many parts of New York University.

For the next two years, Melissa Goodman will clerk for Federal District Judge Block in the

Eastern District of New York. For the next two years, Benita Jain will work at the Immigrant Defense Project of the New York State Defenders Association, where she will support community-based organizing efforts and provide legal services to detained immigrants. (Her position has been funded by a Soros Justice Fellowship.) Gabrielle Prisco will serve as the Derrick Bell Fellow at NYU Law School. John Radice will clerk for Judge Edith Brown Clement, U.S. Court of Appeals for the Fifth Circuit, in New Orleans. Priyamvada Sinha will clerk for Ronald L. Ellis, Chief United States Magistrate Judge for the Southern District of New York. Kathryn Sabbeth will be working at South Brooklyn Legal Services.

The Hays Fellows for 2003-2004 are Z. Gabriel Arkles (Tom Stoddard Fellow), Nicholas G. Arons (Roger Baldwin Fellow), Leslie A. Bailey (Deborah Rachel Linfield Fellow), Kevin David Lapp (Leonard Boudin Fellow), Lynn D. Lu (Harriet Pilpel-Planned Parenthood Fellow), Karuna B. Patel (Robert Marshall Fellow), and Melody Rose Spidell (Palmer Weber Fellow).

We deeply appreciate the strong support we have received from the Law School administration from Evelyn Palmquist, the Program's secretary and administrative assistant, and from the numerous individuals and foundations that have provided financial support. Above all, we are grateful to the scores of former Hays Fellows who have supported the Program and remain in close touch, relaying information about their own lives and work, and in various ways assisting us as we continue to build a strong civil liberties community at and beyond Washington Square.

Norman and Sylvia observed this year that the pool of Hays applicants was exceptionally strong. This is striking because we discourage applications from the many able public interest students who have been awarded Root-Tilden-Kern Fellowships. This record encourages us to think that commitment to civil liberties is broad and vigorous at NYU Law School and that the Hays Program is regarded as a central participant in satisfying our students' public interest goals.

Norman Dorsen
Sylvia A. Law
Helen Hershkoff
Michael Wishnie