

September, 2005

ARTHUR GARFIELD HAYS CIVIL LIBERTIES PROGRAM  
ANNUAL REPORT 2004-2005

As always, the heart of the Hays Program is the important work of the Fellows, which is reported more fully below. This year the rights of immigrants, ex-offenders and gay and lesbian people dominated the Fellows' choice of placement. Their activities also focused on important issues involving the First Amendment and economic rights.

As we reported to you at the time, Kim Barry, Hays Fellow 1997-1998, died tragically on Saturday, November 20, a few days after being hit by a pick-up truck. Kim was an extraordinary person. Born of Bahamian and Australian parents, she was raised in the two countries. She came to the Law School after receiving a Bachelors degree from Georgetown University School of Foreign Service and a Masters from the Fletcher School of Law and Diplomacy. She performed brilliantly here (Order of the Coif, Articles Editor of the Law Review) and in particular as a Hays Fellow. Her work was not only superb, but she also showed herself to be altruistic, warm and good-humored. She captivated all who knew her. NYU held a memorial service for her on November 23, at which she was mourned by friends and family from around the world. At the time of her death she was finishing an article on the legal rights and obligations that emigrants have to both their old and new nations. The NYU Law Review is publishing a symposium on her work. We miss her terribly

As in past years, former Hays Fellows met with current Fellows to discuss informally experiences as Hays Fellows, their careers, and other issues. Last year the two Fellows were Mallika Dutt, Hays Fellow 1988-1989, and Judy Rabinovitz, Hays Fellow, 1984-1985, both of whom sparked fascinating discussions.

Three other events merit particular notice. The first is that the old Arthur Garfield Hays Seminar Room, which was in Vanderbilt 312, succumbed to the extensive renovations in Vanderbilt in 2004. A new Hays seminar room is situated in Furman 330 (the new law school building); it contains the same Hays memorabilia as in the past. Everyone is invited to view the room.

Second, in early preparation for the 50<sup>th</sup> anniversary of the Hays Program in 2008, we have commissioned a history that will attempt to recapitulate the events of every Hays class since 1958-1959 and to identify civil liberties themes that the Program has championed. We are fortunate that Gabrielle Prisco (Hays Fellow 2002-2003) has agreed to prepare the history. She may be in touch with some of you if information not contained in our files is needed to complete the portrait of your Hays year.

Finally, we are pleased to report that the effort to establish a Hays Fellowship- in Norman's name has been successfully concluded. This is the Program's eighth fellowship and will permit more civil liberties work to be conducted. Almost one hundred former fellows contributed to the fund, along with many friends of Norman and the Program. We are grateful for this wonderful support.

Major accomplishments of former Fellows are reported in an Appendix. Once again, we apologize to anyone we may have missed.

## 1. THE FELLOWS

The Hays Fellows in 2004-2005 were: Maissa C. Boulos (Robert Marshall Fellow), Brina Milikowsky (Deborah Rachel Linfield Fellow), Celine Mizrahi (Palmer Weber Fellow), Peter C. Pihos (Robert Baldwin Fellow), Naomi Sunshine (Leonard Boudin Fellow), Tara Urs (Tom Stoddard Fellow). Fellows are selected on the basis of their demonstrated commitment to civil liberties, their legal abilities and academic excellence. Virtually all the Fellows are involved in a wide range of public interest work.

The Fellows' Hays work is largely driven by their individual interests. As most readers know, 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 request for assistance must be denied. The supervising lawyers provide great projects and guidance, and the Fellows contribute valued work. Many Hays supervisors have become regulars. 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. 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, and it is not possible to predict career paths, which may be decisively influenced by a Hays assignment..

### A. Immigrant Rights.

In the fall, Celine Mizrahi worked for the ACLU Immigrant Rights Project, supervised by Lee Gelernt, staff attorney, researching the impact of federal legislation limiting state authority to extend benefits to undocumented immigrants. In 2003, Kansas enacted a law extending the right to receive in-state tuition at public post-secondary institutions to undocumented students who meet certain additional requirements – among them, in-state residence. A class of students enrolled in public colleges and universities who are U.S. citizens but not residents of Kansas filed suit, challenging the law as violating federal laws enacted as part of 1996 changes to federal welfare and immigration statutes. The ACLU was in the unusual position of being intervenor-defendants. The federal laws in question had nearly no legislative history and there existed almost no case law interpreting them, so Celine researched and wrote several memos interpreting those federal laws and how they might affect the Kansas law. The ACLU relied on

her work in its motion to dismiss filed in January. As of yet there has been no result in the case, Day v. Sebelius.

Naomi Sunshine worked at the Urban Justice Center's Community Development Project (CDP) under Serge Martinez, Andrew Kashyap, and Carmen Huertas. She provided legal support to grass-roots community institutions working for social change in New York City's low income and immigrant communities, investigating possible discriminatory treatment of Muslim organizations seeking to incorporate as not-for-profit corporations. She also researched real estate and land transfer questions for an organization working for the economic, environmental and cultural revitalization of the Hunt's Point area of the South Bronx. In addition, she explored health care licensing requirements governing diagnostic testing for an organization made up of low-income immigrant workers wanting to promote health among its members by harnessing the expertise of some of their members, who had been health care providers in their native countries.

In the spring, Brina Milikowsky worked at the Brennan Center for Justice, both in the Democracy Program, under the supervision of Wendy Weiser, and in the Poverty Program, under the supervision of Emily Chiang. For the Poverty Program, Brina began a project concerning the rights of foreign workers who are granted temporary non-agricultural employment under the H-2B visa program. Temporary guest-workers in the H-2B program are one of the classes of people carved out of federally funded legal services programs. However, because their immigration status is tied to their specific job, and because as temporary and alien low-wage workers they are susceptible to poor treatment and labor violations, there seems to be an urgent need for free legal services to protect their rights. Brina's assignment was to conduct preliminary research about what, if any, recent immigrants rights' advocacy work or research had been conducted on H-2B guest-workers and to begin to compile data and anecdotes about the experiences of people participating in the program. She gathered news stories which document harsh conditions and other workplace violations affecting temporary H-2B guest-workers without access to legal services. Her initial findings will form the basis of a longer term Brennan Center study documenting the mistreatment and abuse of temporary non-agricultural guest-workers and establishing the need for federally funded legal services for H-2B guest-workers.

In the fall semester Maissa Boulos worked with Alex Reinert at Koob & Magoolaghan, a four-lawyer civil rights firm that focuses on prisoners' rights, employment discrimination, and disability rights. She worked primarily on two cases. In the first, Elmaghraby v. Ashcroft, Koob & Magoolaghan, along with an attorney from the Urban Justice Center's Community Development Project, filed a complaint against John Ashcroft, numerous high-level FBI and Bureau of Prisons officials, and administrators and corrections officers at the Metropolitan Detention Center in Brooklyn on behalf of two clients, both Muslim men, who were detained pending trial on low-level felony charges unrelated to terrorism shortly after September 11, 2001, and were arbitrarily and discriminatorily classified as "of high interest" to the FBI. The complaint alleges that on the basis of this classification, the men were segregated to an "administrative maximum special housing unit" that was created specifically for post-9/11 detainees and subjected to cruel and degrading treatment, including physical abuse, unnecessary

strip and body cavity searches, and interference with the ability to practice their religious beliefs. Maissa wrote a series of memos outlining the legal bases for denying qualified immunity to the defendants with respect to the segregation of the plaintiffs in the administrative maximum special housing unit, the strip and body cavity searches, and various violations of the Eighth and/or Fourteenth Amendments. She also wrote a memo arguing that the court could exercise long-arm jurisdiction over one of the defendants, the Director of the federal Bureau of Prisons, based in Washington, D.C.:

#### B. Rights of Gay and Lesbian people.

In the fall semester, Peter Pihos worked at the ACLU Gay & Lesbian Rights Project, under the supervision of Ken Choe. His primary focus was *Li v. Oregon*, a marriage equality case. The dispute underlying *Li* began when the Board of Commissioners of Multnomah County decided to issue marriage licenses to same-sex couples, after receiving an opinion from its counsel that statutory bars to such marriages were unconstitutional. The Board issued licenses to approximately 3,000 same-sex couples were married. The State Registrar, however, refused to record the marriages, arguing that doing so would violate Oregon's marriage laws. As a result, a law suit was filed by the couples, Basic Rights Oregon, the ACLU, and Multnomah County seeking a declaratory judgment that any statutes preventing same-sex couples from marrying on the same terms as opposite-sex couples violated the equal privileges and immunities clause of the Oregon Constitution. After the trial court found the laws to unconstitutionally grant benefits to opposite-sex couples, it gave the legislature an opportunity to create a remedy. The Supreme Court of Oregon took direct appeal of the trial court's decision, but while it was pending, the voters of Oregon submitted a referendum initiative, Measure 36, providing that "[i]t is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage." Days before Ken Choe was to argue the case in the Oregon Supreme Court, the voters passed the initiative.

Peter wrote several memoranda. First, he examined whether it would be procedurally proper for the ACLU to challenge the constitutionality of Measure 36 in their appeal to the Supreme Court; he concluded that, under Oregon's procedural law, the constitutionality of the measure could be raised defensively if the defendants attempted to assert it offensively as the controlling rule. Second, he examined specific provisions of the Oregon constitution—the single-subject and separate amendment provisions – and concluded that neither was violated by the ballot measure at issue. Third, he explored all possible constructions of Measure 36 that the ACLU could offer to the court, including a number of (highly formalist) theories that would have mitigated the impact of the measure. Fourth, because the Oregon Supreme Court has rules for construing ballot measures, which involve looking to materials available to the public, he examined these rules and constructed a history that based on available material that helps mitigate the impact of Measure 36.

During the fall semester Tara Urs also was engaged with gay rights issues. She worked at Lambda Legal Defense and Education Fund primarily on two projects related to marriage equality for same-sex couples and challenges of the Defense of Marriage Act. First, she

reviewed the literature on federalism and the varying uses of the "laboratories of experimentation" justification for the federal system. The purpose of the memo was to provide support for the notion that the question of marriage equality for same-sex couples may properly be decided by state courts. Her other major project involved researching the nature of the appellate jurisdiction of the Supreme Court in the 1970s and 80s. In recent DOMA-related litigation the Attorney General relied on a 1960s Supreme Court decision, *Baker v. Carr*, which summarily dismissed the constitutional claims of a gay couple from Minnesota seeking the right to marry. Under the rule of *Hicks v. Miranda*, summary dismissals are treated differently from denials of certiorari, and may in some cases be treated as precedent. Tara's memo discussed why *Baker* would not be Supreme Court precedent binding lower courts today.

### C. Rights of Ex-Offenders

In the spring, Peter Pihos worked at MFY Legal Services in the Workplace Justice Project (WJP), under the supervision of Chaumtoli Huq. The WJP assists low-income clients with employment matters including unemployment insurance (UI) hearings and appeals, licensing appeals, employment discrimination, health/safety violations, and minimum wage/overtime violations. Peter's focused on the employment problems of ex-offenders.

He drafted briefs in unemployment insurance cases for individuals who were fired for reasons relating to their criminal convictions. One case involved Mr. R., who had initially been hired four years earlier by Bellevue Hospital while he was still on probation for a felony. Faced with an application question about criminal convictions, he answered that he had never been convicted of a crime. Mr. R. gave his fingerprints along with his application, but the employer performed no criminal record check at that time. After four years of receiving nothing but excellent marks for his service and two promotions, an incident involving another employee prompted the employer to run background checks on every employee. Upon discovering Mr. R's convictions, the employer fired him. Regardless of whether they could have fired Mr. R. based on the conviction itself or whether it would be unlawful grounds for firing him, an applicant's denial of criminal history is itself sufficient and lawful grounds for termination or denial of the application. In opposing the denial of unemployment benefits, MFY argued that notwithstanding Mr. R's misconduct, he was entitled as a matter of law to a hearing before being fired because his termination was for reasons unrelated to his employment performance.

A second case involved Mr. M. who had worked as a janitor in a pre-school for children with developmental difficulties in Manhattan for almost one-and-a-half years before being fired. In March 2003, he was arrested in Brooklyn on a weekend night (not during working hours) and charged with felony possession of a controlled substance. Mr. M. pled guilty to misdemeanor possession in front of the Brooklyn Drug Treatment Court. If Mr. M. completes one-year of treatment, his conviction will be dismissed. Peter argued that the court had misapplied the law governing when employees could be fired for off-duty misconduct. Mr. M. was a private employee whose arrest occurred in a different borough from his work, outside of working hours, and did not relate to the requisites for the job nor impacted his performance of it. MFY argued that the nexus between his misconduct and his job was far too weak to sustain a denial of

benefits.

Finally, Peter prepared the outline for a training session for legal and social service providers who work with ex-offenders in order to spur discussion and raise awareness as to the issues that ex-offenders -- like Mr. R. discussed above -- were facing even after they had gotten their first jobs following their convictions. This outline provided an overview of the employment law landscape in New York for ex-offenders and collected a number of resources and references.

Maissa Boulos worked with Koob and Magoolaghan on *Nicholas v. Goord*, argued before the Second Circuit in the spring 2005. *Nicholas* is a Fourth Amendment challenge to a New York state statute that requires individuals convicted of certain felonies to submit DNA samples for inclusion in a DNA database. The plaintiffs are twelve current or formerly incarcerated felons subject to the DNA statute. The defendants are the Commissioner of the New York State Department of Correctional Services, the Director of the New York State Division of Criminal Justice Services, the private company that performs the DNA testing for the state, and an employee of that company that drew blood from some of the plaintiffs. The plaintiffs are seeking a preliminary injunction against the taking of DNA samples, while the defendants have filed a motion to dismiss.

Some of the plaintiffs have already submitted their DNA, while others have refused to do so. There are similar statutes in most states and under federal law. Some apply only to persons on probation or conditional release, while others apply to all prisoners. These statutes have been challenged across the country, with very little success. Only one court has found such a statute to violate the Fourth Amendment. The Ninth Circuit did hold a DNA database statute unconstitutional in a 2002 case, but that opinion was very recently reversed en banc. In 2003, Magistrate Judge Gorenstein issued a Recommendation that *Nicholas v. Goord* be dismissed and Judge Duffy agreed with the Magistrate Judge's conclusion, but not its analysis. The plaintiffs appealed to the Second Circuit, and Maissa began working on the case shortly before the opening appellate brief was due. The key issue on appeal was whether the district court erred when it refused to apply the Fourth Amendment "special needs" doctrine to the collection and databanking of DNA under the New York statute. She drafted a section of the brief arguing that the district court erred when it held that it did not have to apply a "special needs" analysis because the plaintiffs had a diminished expectation of privacy. In light of Supreme Court precedent regarding special needs searches, she argued that a diminished expectation of privacy is relevant only if the court finds that a special need beyond the normal need for law enforcement exists for a search, and it has no place in determining whether or not such a special need exists in the first place.

In the spring, Maissa Boulos worked at the Urban Justice Center's Mental Health Project, which has a subdivision focused exclusively on criminal justice issues affecting mental health consumers. Her supervisor was Jennifer Parish. She worked on three assignments. In 1999, the Mental Health Project filed a class action lawsuit, *Brad H. v. The City of New York*, in New York State Supreme Court, challenging New York City's practice of discharging inmates

with psychiatric disabilities from the Rikers Island jail in the middle of the night with only a \$3 Metrocard and \$1.50 in cash, and without any psychiatric medications or referral to services. UJC and co-counsel argued that this practice violated a New York state law that requires public institutions to provide discharge planning services to mentally ill individuals upon their release to the community, as well as the New York state constitution. A preliminary injunction was granted in 2000, ordering the City to arrange for the continuing mental health care of the more than 30,000 class members discharged each year from City jails. The parties subsequently reached a settlement, which mandates, in specific detail, that the City provide discharge planning services to all inmates at Rikers Island who meet the criteria for mental illness.

In addition to providing for monitoring of the City's implementation of the settlement decree by independent compliance monitors, the settlement decree mandates that class counsel be given access to class members at Rikers Island to monitor the City's compliance with the settlement. Maissa accompanied a social worker with the Mental Health Project on visits to Rikers Island once a week. She interviewed class members about their experience, if any, with discharge planning services at the jail and drafted reports summarizing my findings for submission to Office of Mental Health's Division of Forensic Services.

Brad H. applies only to jails in the City of New York. The Mental Health Project, in conjunction with other legal organizations, is preparing a lawsuit challenging the state's failure to provide discharge planning to state prison inmates who suffer from mental illness. Maissa's second assignment was to research factual and legal issues for the draft complaint.

Maissa's final spring assignment was with Munir Pujara, Hays Fellow 1999 and now a Staff Attorney in the Urban Justice Center's Homelessness Outreach and Prevention Project. Munir is raising funds to begin an Offender Reentry Project at the Urban Justice Center. Maissa researched possible issues for litigation related to parole in New York State. She also looked at the factors that can permissibly affect the Board of Parole's decision to grant or deny parole to an eligible inmate, focusing on possible legal avenues to challenge parole denials that are based on an inmate's failure to complete a recommended treatment program when that inmate is on a waiting list for or has otherwise denied access to the program in question.

#### D. First Amendment.

In the fall, Brina Milikowsky worked at the National Coalition Against Censorship, under the supervision of Joan Bertin, president of NCAC and Hays Fellow, 1973. She helped to launch The Knowledge Project, a public education and advocacy project exploring the constitutional dimensions of government secrecy and distortion of information and the ways in which they cause censorship in violation of First Amendment principles. Whether by cutting off the flow of information to the public, or by intentionally manipulating or distorting information disseminated to the public, the Bush Administration has warped the "marketplace of ideas" in many areas. While open government advocates have complained about the "shroud of secrecy" enveloping the government, First Amendment and anti-censorship advocates have not focused much of their energies on this disturbing trend. The goal of the Knowledge Project is to explore

the connections among the varied forms of government suppression and manipulation of research and intellectual speech and recast the secrecy shroud as a gag on free speech. By tapping into the civil liberties and anti-censorship advocacy community, the Knowledge Project will broaden the discourse about and concern for these troubling government patterns. At NCAC Brina researched government manipulation of scientific research and information, suppression of academic exchange, and erosion of the knowledge base. She catalogued and analyzed her findings in a 60-page report which is currently under revision for publication this summer.

#### E. Educational Equality.

In the fall, Naomi Sunshine worked at the New York Civil Liberties Union, under the supervision of Legal Director Arthur Eisenberg, and also working closely with Don Shaffer, on *New York Civil Liberties Union v. State of New York*. The NYCLU brought suit on behalf of a class of children & parents of children attending 150 "failing" (as measured by both resources and outcomes) schools in the state of New York, but outside New York City. The case sought to compel the State to provide children in "failing schools" beyond the geographic limits of the City with the state-constitutionally-required "opportunity" to receive "a sound basic education." The case raised a constitutional claim – that the state was failing to provide the opportunity for a sound basic education; and a regulatory claim – that the court should require the State to follow its own regulatory procedure for addressing failing schools. Naomi conducted extensive research in two areas in preparation for briefing and argument in the New York Court of Appeals. First, using various methodologies and measures of the resources required to provide a constitutionally adequate education, she came up with a rough estimate of the cost of providing a that education to the students represented. Second, she researched the impact of the federal No Child Left Behind Act on state regulations and the interaction between federal and state educational mandates. In February, 2005, the New York Court of Appeals decided the case. Unfortunately, the court found that the NYCLU complaint failed to state a cause of action because it did not allege district-wide failure to provide the constitutional minimum, a prerequisite for finding state responsibility.

#### F. Transitional Justice.

During the spring semester Tara Urs worked at the International Center for Transitional Justice, an international NGO that provides legal and other support to governments and civic groups in countries emerging from a period of widespread human rights abuse. Tara helped the ICTJ staff plan a trip to Cambodia, speaking to experts on the upcoming criminal trials for the Khmer Rouge. She also prepared a memorandum on the jurisdiction of the East Timor Serious Crimes Unit and Special Panels for Serious Crimes. Finally, she also did some preliminary research on calls for truth commissions in countries that have recently fundamentally changed governments.



### G. Protection of Pregnant Women.

In the spring, Celine Mizrahi worked for National Advocates for Pregnant Women, supervised by Lynn Paltrow, Hays Fellow 1983. At NAPW, Celine did both direct client work and both legislative and legal advocacy. One of NAPW's objectives is exploding the pejorative myths that surround pregnant women who use drugs. The organization was instrumental in distributing an open letter from doctors and scientists about the myth of the crack baby. A similar myth surrounding "meth babies" has, in the course of the past few months, led several states to enact legislation imposing heavy civil penalties on women who test positive for drug use while pregnant. She drafted a letter compiling research about the truth about "meth babies" for distribution to the leading scientists and doctors and intended for eventual publication as an open letter in the major newspapers. She also did a detailed legislative analysis of proposed Colorado and Arkansas legislation threatening automatic or nearly automatic termination of parental rights of mothers who used illegal drugs while pregnant. These proposed bills were based on misconceptions about the effects of drug exposure in utero, and even more importantly, gave no room for treatment and training of child welfare workers and health care professionals.

Her main project for the semester concerned the Marlowe family, a case in which a hospital in Pennsylvania obtained a court order mandating a pregnant mother of six to have a C-section for the birth of her seventh child and granting the hospital custody of the infant before, during and after delivery. She interviewed the woman and her husband and prepared affidavits about their experience. After investigating the possibility of legal action against the hospital, we decided in the end to complain to the Pennsylvania Hospital Commission about the hospital's use of the courts to mandate an unnecessary medical procedure against the mother's will, without any notice to her or her presence in court. The complaint was to be submitted to the Pennsylvania authorities by the end of the summer.

### H. Voting Rights.

Brina Milikowsky drafted model legislation providing for challenges to voter registration qualifications for the Brennan Center Democracy Project. In the aftermath of 2004 litigation over Ohio party operatives' challenges voters' qualifications, parties to the litigation solicited guidance from the Brennan Center in devising a settlement which would safeguard voters' rights while allowing challenges to diminish voter fraud. She researched and analyzed the challenger laws of roughly two dozen states, and prepared a report comparing different voter challenger procedures and recommending best practices. She then drafted a model bill providing for advance and Election Day challenges to voter qualifications while best protecting voters from poll workers' uncabined discretion and preserving greatest access to the franchise. Many state legislatures, in the wake of the Ohio and Florida challenger controversies during the 2004 election, have recently introduced bills revising their voter challenger laws. Brina's collection of best practices and draft of model challenger legislation, the Brennan Center hopes to encourage states to revise their laws to better protect the integrity and effectiveness of voters' rights.

## 2. THE DIRECTORS.

Norman Dorsen. Norman continues to divide his time between law school duties and serving as counselor to NYU President John Sexton.

At the law school, Norman again taught the course in Statutory Interpretation. He spends much of his time acting as editorial director of the quarterly International Journal of Constitutional Law (I•CON), which he founded in 2001, and, until the beginning of 2005, as president of the U.S. Association of Constitutional Law. The journal has completed its third year of publication with authors and editorial board members from more than 40 countries. In January Norman organized and moderated a "conversation" between Justice Antonin Scalia and Justice Stephen Breyer on the question whether it is appropriate for American courts to cite to foreign materials in U.S. constitutional cases. C-Span carried the event in full, and the transcript will be published in the October issue of I•CON.

Norman is part of a planning group organized by the American Association of Law Schools that is establishing an International Association of Law Schools with representation from all parts of the world. He continues to direct the James Madison lectures at the law school, he continues as a board member of The Thomas Jefferson Center for the Protection of Free Expression (in Charlottesville, VA), and served on the advisory committee to a report of the Council on Foreign Relations on power-sharing in Iraq. He spoke and moderated a discussion at Cardozo Law School on the "H-Bomb" case in which a district court entered what was apparently the first prior restraint on a publication (Progressive Magazine). He continues as a member of the National Advisory Council of the ACLU.

At the university, after completing a two year study of undergraduate education at NYU (there are eight schools with their own undergraduate programs, probably the most in the U.S.) that an external accrediting agency, Middle States Association Commission on Higher Education has approved, Norman is helping to supervise the University's implementation of the report's recommendations. He is also working on several other university projects.

2004 was the 50<sup>th</sup> anniversary of the Army-McCarthy Hearings, which led to the downfall of Senator Joe McCarthy and a gradual weakening of the anti-civil libertarian excesses of the 1950s. As many of you know, during his first year after law school Norman worked with the Army lawyers against McCarthy throughout the Senate hearings. During the 50<sup>th</sup> anniversary year he delivered many talks about the hearings, including a comparison of McCarthy's excesses with those of the current Bush administration.

Sylvia A. Law. Sylvia also had a busy year. She continued her efforts to assure that law school recruitment services are not open to employers who discriminate on the basis of a variety of invidious and irrational factors, including sexual orientation. In November, 2004 the Third Circuit Court of Appeals held that the Solomon Amendment requirements violate the First Amendment. She has worked with others in preparing for argument in the Supreme Court in the

fall 2005. ="<http://www.solomonresponse.org>"MACROBUTTONHtmlResAnchor

Sylvia worked on reproductive freedom issues, serving on the Board of the Center for Reproductive Rights. She wrote *Abortion: Should the Courts Just Shut Up?* (an e-mail debate with Prof. Douglas W. Kmiec of Pepperdine Law School) *LOS ANGELES TIMES*, Jan. 16, 2005. She also wrote a biography of Harriet Pilpel, a wonderful leader of both the ACLU and Planned Parenthood, who is honored by one of the Hays Fellowships. *Harriet Fleischi Pilpel in NOTABLE AMERICAN WOMEN*, ED. SUSAN WARE, Harvard University Press, 2004.

As a board member of the Compassion in Dying Federation she worked to organize the merger of that group with End of Life Choices, the large membership organization working in this area. In the fall 2005, the Supreme Court will hear argument in the U.S. government's appeal from the Ninth Circuit's decision rejecting Attorney General John Ashcroft's effort to use the federal Controlled Substances Act to thwart Oregon's Death with Dignity law. Sylvia has been helped to organize and write briefs in this important case.

In fall 2005 Sylvia will visit at the Temple University Beasley School of Law as the Hon. Phyllis W. Beck Chair in Law. She will lead an interdisciplinary colloquium on the intersections of health, medicine, law, and social policy. It will bring together students, academic, activists, and professionals to discuss tensions between health care financing and access, changing patterns of childbirth, conflicts between science a morality, choice at the end of life, race disparities in health care, and alternative models of health care delivery. She will continue to be at NYU as Co-Director of the Hays Program, Chair of the Rose Sheinberg Scholar in Residence Program, and Chair of the Placement Committee. In 2006, Sylvia will have a Joint Appointment at the University of Hawaii Schools of Law and Medicine, but will come back to New York for Hays selection work in the Spring, and will return in January 2007.

This year Sylvia was elected a Fellow of the prestigious American Academy of Arts and Sciences. She joins Norman, who was elected in 1996.

Helen Hershkoff. Returning from a sabbatical, Helen taught Civil Procedure in the fall and Federal Courts in the spring. During winter break, she continued her practice of organizing a luncheon series with judges for her first-year students. She served as chair of the Lawyering Personnel Committee, during a busy year in which the committee interviewed more than 150 candidates and recommended appointments for eleven new Acting Assistant Professors, including Rebecca Rosenfeld, Hays Fellow 1996. Helen took the lead in preparing a new edition of the Cound, Friedenthal, Miller & Sexton civil procedure casebook (now, Friedenthal, Miller, Sexton & Hershkoff, *Civil Procedure: Cases and Materials*) and an accompanying Teacher's Manual. She continued to work on a book-length project on comparative civil procedure and to do research about private laws, and also wrote a short piece on Judge Fuchsberg's Levittown dissent published in the *Albany Law Review Special Issue on State Constitutional Commentary* (2005). She served as a member of the board of directors of the Urban Justice Center and of the Brennan Center for Justice and was selected to be a Governor of the Harvard Club of Westchester, where she served on the School's Book Prize Committees. In July, she presented a

paper, "The Dick Whittington Story: Theories of Poor Relief, Social Ambition, and Possibilities for Class Transformation," at a conference in Gloucester, England on The Power of Stories: Intersections of Law, Culture & Literature: Celebrating the 400th Anniversary of the Tale of Dick Whittington and His Cat.

Michael Wishnie. Mike was on research leave in the fall 2004 and a visiting professor of clinical law at Yale in spring 2005. Through the fall he remained actively involved in litigation and other advocacy projects begun at NYU, including supervising NYU Immigrant Rights Clinic students handling National Council of La Raza v. Ashcroft (E.D.N.Y.), a suit started in 2003 by Hays Fellows Peter Pihos and Brina Milikowsky (then 1Ls) and Melissa Goodman, Kathryn Sabbeth, Benita Jain, and Gabrielle Prisco, and Bronx Defenders v. DHS (S.D.N.Y.) a related Freedom of Information Act suit handled by Hays Fellow Naomi Sunshine and others. Mike also continued to litigate immigrant rights and labor cases as a cooperating attorney for the ACLU Immigrants' Rights Project, NYCLU, and personally. In the spring, Mike co-taught two clinics at Yale, the Community Lawyering Clinic and the Balancing National Security and Civil Liberties After September 11 Clinic, and supervised the student-run Yale Workers Rights Project.

Mike's publications in 2004-05 included co-authoring chapters on the Supreme Court's 2002 opinion in Hoffman Plastic Compounds, Inc. v. NLRB (undocumented worker discharged for union organizing ineligible for backpay under NLRA, where worker tendered false papers and employer unaware of worker status) for Laura Cooper & Catherine Fisk, eds., *Labor Law Stories* (Foundation Press: 2005) and for Peter Schuck & David Martin, eds., *Immigration Law Stories* (Foundation Press: 2005) and *Municipal Minimum Wage Laws, Living Wage Campaigns, and Labor Organizing*, in Samuel Estreicher, ed., *Compensation, Work Hours, and Benefits*, Proceedings of New York University 57th Annual Conference on Labor (forthcoming 2005). Mike also conducted field research interviewing police, city officials, and community advocates in communities around the country for a forthcoming paper on police enforcement of immigration laws that he is co-authoring with Doris Meissner, former INS Commissioner, for the Migration Policy Institute.

During 2004-05, Mike gave talks or presented papers at the Princeton University Program in Law and Public Affairs, Yale Law School Faculty Workshop, NYU Criminal Law Area Group, Chicago-Kent School of Law, American Constitution Society New York Chapter, and regional journalists' briefings organized by The Century Foundation in Newark, Atlanta, Chicago, and Los Angeles. In 2005 he was also recognized as a "Builder of the New New York" by the New York Immigration Coalition at its first award ceremony in eighteen years.

### 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. Court's of Appeals. All told, 14 Supreme Court justices and 20 Court of Appeals judges have delivered Madison lectures. Norman has directed the Madison lectures since 1977, and he administers the lectures as part of the Hays Program. The fall 2004 lecture was delivered by Judge Diane Wood of the Seventh Circuit Court of Appeals on "Our 18<sup>th</sup> Century Constitution in the 21<sup>st</sup> Century World." The 2005 lecturer will be Judge Pierre Leval of the Second Circuit and the 2006 lecturer will be Chief Judge Michael Boudin of the First Circuit.

### 4. THE FELLOWS' NEXT STEPS.

Maissa Boulos will be a Litigation Fellow at Bernabei & Katz, a small, private civil rights firm in Washington, D.C. which focuses primarily on employment-related issues. Brina Milikowsky will be working in the litigation department of Simpson Thacher & Bartlett, in New York. Celine Mizrahi will be working at Cahill Gordon & Reindel. Peter Pihos is finishing his academic work at NYU to earn a Ph.D. Naomi Sunshine will be working as a clerk to the Honorable Constance Baker Motley, S.D.N.Y., starting in the fall. Tara Urs is in Cambodia, sponsored by the SOROS Foundation, and working on a project to involve the majority of people who live in rural areas in the pending criminal trials for the Khmer Rouge.

### 5. NEW FELLOWS.

The Fellows for 2005-2006 will be Anne Arkush (Deborah Rachel Linfield Fellow), Cyrus Dugger (Roger Baldwin Fellow), Elizabeth Kennedy (Tom Stoddard Fellow), Christopher J. Murell (Robert Marshall Fellow), Hannah Roman (Harriet Pilpel-Planned Parenthood Fellow), Susan S. Shin (Palmer Weber Fellow).

### 6. THANKS.

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 Dorsen  
Sylvia A. Law  
Helen Hershkoff  
Michael Wishnie