

August, 2007

ARTHUR GARFIELD HAYS CIVIL LIBERTIES PROGRAM
ANNUAL REPORT 2006-2007

The work of the Hays Fellows always reflects the ever-evolving challenges to civil liberties. Although national security issues continued to dominate the headlines, this year's six Hays Fellows devoted much of their energy to seeking economic justice for the poor. In addition, Fellows worked on important issues involving the defense of immigrants, racial discrimination, criminal justice, gay rights, international human rights and workers' rights.

In fall 2006, Professor Martin Guggenheim (Hays Fellow 1970-1971) served as Acting Co-Director while Sylvia taught at the University of Hawaii. The Fellows appreciated the insight and experience that Marty brought to the Hays Program and our seminar discussions.

As in past years, former Hays Fellows met with current Fellows to discuss informally their experiences with the Program, their careers, and other issues. Maddy deLone, Hays Fellow 1993-1994, and now Executive Director of The Innocence Project, met with the Fellows in the fall semester and Jay Ward Brown, Hays Fellow 1991-1992, and now a lawyer in private practice who specializes in free speech cases, joined us for conversation in the spring. In addition, Mike Wishnie, former Hays Co-Director, met with the Fellows in the spring and talked about the challenges of his new work at the Yale Law School. All three conversations were fascinating and instructive.

The 50th anniversary reunion of the Hays Program is now scheduled for May 17, 2008 and Justice Ruth Bader Ginsburg has agreed to be the keynote speaker. Norman is continuing work on a compilation of activities of every Hays class since the beginning (1958-1959) and to identify civil liberties themes that the Program has championed. Gabrielle Prisco (Hays Fellow 2002-2003) and Kathryn Sabbath (Hays Fellow 2002-2003) have ably assisted with this project, and Helen and Sylvia have also contributed.

In January 2007, the American Association of Law Schools honored Norman with the first Award for Lifetime Contributions to the Law and to Legal Education. NYU President John Sexton offered an eloquent tribute and Norman responded with moving reflections on his career. AALS President Judith Areen said, "No one could better exemplify the qualities the Association of American Law Schools intended to honor with this award than Norman Dorsen. His important contribution to the development of law and legal education through his work both inside and outside the academy serves as a model for us all. I am delighted with his selection." More than a dozen former Fellows, and hundreds of law professors and D.C. lawyers, joined in the celebration of our leader and mentor. If you would like a copy of the citation of the AALS or Norman's remarks, just ask.

On February 27, the Hays Program co-hosted an event with the American Constitution Society, presenting the film, "Soul of Justice: Thelton Henderson's American Journey." Judge Henderson, who serves on the U.S. District Court of the Eastern District of California, was introduced by Judge Laura Taylor Swain, U.S. District Court for the Southern District of New York, and Professor Derrick Bell of NYU Law. The conversation following the film included remarks by Abby Ginzberg, the producer and director of the film, and Lisa Brown, the Executive Director of the American Constitution Society.

In March, Evelyn Palmquist, the Program's long-time secretary and administrative assistant, had an emergency appendectomy. Complications developed and Evelyn was in the hospital for an extended period. She is now on the mend and will be returning to the Law School in the fall. Because of the demands of the Hays program, Evelyn has decided to take a less demanding position when she returns. Our concerns and good wishes have been with Evelyn and we are so pleased that she is recovering.

On May 10, Helen hosted a reception for the Fellows and their families. It was a delight to meet the friends, partners, siblings and loved ones who have helped to make the Fellows the outstanding people that they are. The event was such a success that we anticipate that it will become an on-going event of the Program.

Because we will meet in May 2008 for the 50th anniversary, this report dispenses with the usual appendix on "news from Fellows".

1. THE FELLOWS

The Hays Fellows in 2006-2007 were Trisha Bushnell (Robert Marshall Fellow), Shabnam Faruki (Deborah Rachel Linfield Fellow), Rebecca Fisher (Tom Stoddard Fellow), Jennifer Friedman (Roger Baldwin Fellow), Daniel Hennefeld (Leonard Boudin Fellow) and Sarah Parady (Palmer Weber Fellow). Fellows are selected following interviews by the Fellows and Directors on the basis of their demonstrated commitment to civil liberties, their public interest experience, and their academic qualifications.

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 assist them. The demand for committed, talented help in public interest work always outstrips the supply. The supervising lawyers provide interesting projects and guidance, and the Fellows make valuable contributions. It is a special joy when a former Fellow supervises a current student. We savor these ongoing relations, and always welcome the opportunity to add new placements or to revive older ones.

During the year, at regular meetings, each Fellow leads a discussion of a current civil liberties case on which he or she has worked. Apart from sparking interesting discussions, these seminars often contribute to the strategy or substance of a case.

We insist that each Fellow take on different assignments in the fall and the spring, and we strongly encourage Fellows to work on at least one issue that is new to them. These requirements reflect our considered view that the Hays Program is a special opportunity for Fellows to be exposed to a range of issues and public interest practice styles. It is not possible to predict career paths, which may be decisively influenced by a Hays assignment, as they sometimes have been in the past.

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

A. Economic Justice and Workers' Rights.

In the fall, Tricia Bushnell ventured into the field of elder rights during her placement with MFY Legal Services, researching the rights of nursing homes residents under the Older Americans Act. In the spring, she broadened her interest in criminal law to include the effects of the criminal justice system on offender's civil rights. Working with the Equal Justice Initiative in Montgomery, Alabama, she helped to develop a legislative strategy to persuade Alabama to opt out of the federal law denying food stamps and TANF funded benefits to individuals with drug convictions.

In the spring semester, Sarah Parady worked at the Foreclosure Prevention Unit, South Brooklyn Legal Services. She produced a comprehensive memo teasing out the possible applications of the Truth in Lending Act, Home Ownership and Equity Protection Act, and other state and federal laws to a complex mortgage. SBLS has not yet attempted to challenge this variety of mortgage, which has become common in the sub-prime market and is highly misleading to borrowers (and, admittedly, also to NYU law student interns), leading to frequent foreclosures and loss of home equity.

At the Neighborhood Defender Service of Harlem, Shabnam Faruki worked under the supervision of a senior defense attorney who focused on cases involving juveniles being tried as adults. In addition to being involved in client interviews and writing research memos, Shabnam learned a great deal about the dynamics of the courtroom.

She discovered the importance of understanding the individual personalities of the opposing counsel, judge and other members of the court, and adjusting one's behavior accordingly. She also saw the sad and fascinating interplay of race, poverty and the law, which shape young clients' realities from their births.

In the spring, Dan Hennefeld worked at the Brennan Center for Justice, Economic Justice Project, with Raj Nayak and under the supervision of Paul Sonn. Dan worked on research to support the Brennan Center's efforts to improve the content and enforcement of minimum wage laws and other employment laws at the state and federal levels. In 2006, the Center helped get higher minimum wage laws enacted in six states -- Nevada, Montana, Colorado, Arizona, Missouri, and Ohio -- through public ballot initiatives. Dan assisted in advocacy work with allies in those states to ensure that, in the face of strong interest group opposition, these new laws are implemented effectively and loopholes are closed. Dan's work focused on Colorado -- he analyzed Colorado's existing minimum wage regulations, and helped draft proposed new regulations to comply with the wage increase initiative passed in Colorado last year.

In the spring, Becky Fisher worked with Levy Ratner, P.C., a New York union-side labor law firm. Levy Ratner represents, among others, 1199\SEIU United Healthcare Workers East, which includes over 275,000 members and retirees in New York, Maryland, the District of Columbia, and Massachusetts. Rebecca assisted with several cases and authored legal memoranda on labor law issues, including bases for arbitrator credibility determinations, workplace error data and the 8(a)(5) duty of disclosure, third party right to relief in labor dispute-related picketing, and the authority of probation officers to impose probation conditions affecting employment.

B. The Rights of Immigrants.

At the ACLU Immigrants' Rights Project, Shabnam Faruki worked in the fall semester on a broad, long-term project seeking the right to appointed counsel in immigration proceedings. She wrote several memos on the origins and evolution of the right to counsel in the criminal and civil contexts. She also worked on a Ninth Circuit case, *Gutierrez-Vasquez v. United States*, which asks a question that has not been addressed by any circuit: In light of the REAL ID Act of 2005, are aliens who file untimely petitions for review because of ineffective assistance of counsel wholly precluded from obtaining judicial review of their ineffective assistance claims? She tried to find criminal and civil cases where there was a right to effective assistance of counsel even though there was no right to appointed counsel.

Jennifer Friedman interned at the ACLU Immigrant Rights Project in the spring semester. Her projects all focused on the treatment of "mentally incompetent aliens" in deportation proceedings. Her specific assignments included looking for legislative history of the INA provision providing special safeguards for mentally incompetent aliens, including the pre-1952 INA history; the regulatory history in the Federal Registrar and Notice and Comment on regulations introduced relating to mentally incompetent

aliens; and pre-*Gideon* case law on the right to counsel for mentally incompetent criminal defendants. She worked on a motion to reopen to the BIA a case of a schizophrenic non-citizen being ordered deported to El Salvador; for that case, she wrote a memo on the Federal Rule of Civil Procedure 17(c) provision for appointments of guardians ad litem in civil cases in order to draw analogies for application in the immigration context

C. Racial Discrimination.

Sarah Parady worked at the Racial Justice Program of the ACLU in the fall semester. She researched several issues arising from the Rosebud and Pine Ridge Sioux reservations in South Dakota and related them to the ACLU's work on the "School to Prison Pipeline." Both projects were in the early stages, with ACLU contacts or existing clients reporting unjust applications of state law to Native American parents but with no decision from the ACLU to institute litigation. Addressing concerns of an existing Native American ACLU client, she wrote a memo assessing the constitutionality of a statute that requires parents to reimburse the state for the costs of care of institutionalized minors and, unfortunately, found little basis for a challenge.

Sarah also helped the ACLU research a challenge to a series of truancy prosecutions of Native American parents with elementary school children. She wrote a research memo on the viability of a "void for vagueness" challenge to the highly punitive state truancy statute; analyzed other possible constitutional bases for a challenge to the statute as a whole; corresponded with affected parents and local contacts; and assessed less litigation-oriented possibilities such as judicial discipline for a judge who was closely involved in the prosecutions. Upon discovering that some convicted parents were innocent even by the terms of the statute, she investigated procedural possibilities for expunging or overturning their convictions.

In the fall, Dan Hennefeld worked with Emily Chiang and under the supervision of Robin Dahlberg at the ACLU Racial Justice Program. He did legal research on potential impact litigation in Florida to address the severe shortcomings of so-called "alternative schools" (public schools for students with disabilities and/or behavioral problems). These alternative schools represent a confluence of serious civil liberties problems: over-diagnosis of students of color as disabled; excessive use of discipline and expulsions in mainstream schools, especially against students of color; and very inadequate resources and instruction in the alternative schools, which are overwhelmingly attended by students of color. Daniel spent the semester preparing a comprehensive memo providing necessary background for the litigation. The memo analyzed the likelihood for success on potential state and federal constitutional and statutory claims under state and federal education, discrimination, and disability laws; relevant administrative grievance processes; and procedural obstacles that might be encountered in the litigation. The ACLU is proceeding in efforts to develop this litigation in Florida.

D. The Rights of Gay People.

In the fall, Becky Fisher worked with Hayley Gorenberg on several youth and school related projects at Lambda Legal Defense Fund. Her research was incorporated into an appellate brief in *Donovan and Ramelli v. Poway Unified School District*, a suit filed by two high school students who endured severe anti-gay harassment, including death threats, while students at Poway High School in California. In 2005, a San Diego jury found that school officials failed to take appropriate action to protect Donovan and Ramelli, and the case became the first to hold a school liable for failing to address peer harassment effectively under the California Education Code. Becky also completed a research memorandum addressing whether failure to pay faculty advisors to high school Gay/Straight Alliances for their work, while compensating advisors to other similar student groups, violates either the Equal Access Act or the First Amendment.

E. International Human Rights.

In the fall semester, Jennifer Friedman interned at the International Center for Transitional Justice and worked with Paul van Zyl, executive vice-president of ICTJ and an adjunct professor at NYU Law. She attended staff brown bags and heard presentations from ICTJ staff and visitors from around the world on transitional justice questions. She created a draft document that incorporates arguments about the illegality of amnesty laws under international law from a number of ICTJ documents, amicus briefs, oral arguments in front of national and international tribunals, etc. to come up with a cohesive ICJT internal policy, which was then to be presented to the staff, debated, and revisited. She also wrote a memorandum, to be used in advising on Iraq's deBa'athification policies, on the legality under international law of banning political parties and on barring individuals from holding public office based purely on political party participation.

2. THE DIRECTORS.

Norman Dorsen. Norman continues to divide his time between law school duties and serving as counselor to NYU President John Sexton. After completing a two-year study of undergraduate education at NYU 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 reports recommendations.

At the Law School, Norman taught a seminar in Judicial Biographies, which explores opinions of Supreme Court Justices in light of their life experiences. He spends much of his time as editorial director of the quarterly International Journal of Constitutional Law (ICON), now entering its sixth year. The journal has authors and editorial board members from more than 40 countries.

Norman is the U.S. representative on the board of the newly organized International Association of Law Schools (IALS) with representation from all parts of the world. He

continues to direct the James Madison lectures at the law school, to serve as a board member of The Thomas Jefferson Center for the Protection of Free Expression (in Charlottesville, VA), and is a member of the National Advisory Council of the ACLU.

In *re Gault*, the first Supreme Court case holding that juveniles possessed due process rights in delinquency cases, was decided on May 15, 1967. Norman argued the case and on its 40th anniversary he received invitations from, among others, the Open Society Institute, the ACLU, the New York City Bar Association and the National Juvenile Defender Center to speak about the origins and significance of the case.

Sylvia A. Law. In fall 2006, Sylvia held a joint appointment at the University of Hawaii's Richardson School of Law and John Burns School of Medicine. She led an interdisciplinary colloquium on the intersections of health, medicine, law, and social policy, and also taught Constitutional law. She worked with the local LAMBDA group to organize a conference on Don't Ask, Don't Tell and the tensions in simultaneously challenging discrimination and militarism.

In the spring she returned to NYU where she taught Constitutional law and helped lead the Cuban Legal Study group seminar, including a trip to Cuba for spring break. As chair of the Sheinberg Scholar in Residence Program, she helped to organize a program that brought Eva Patterson, President of the Equal Justice Foundation, to the Law School. Sylvia continues to serve as a member of the board of Compassion & Choices, the Center for Reproductive Rights, and the Center for Law and Social Policy. She published her article on the mayors and same-sex marriage in the Stanford Civil Rights and Civil Liberties Law Journal and is working on two articles that bring together health policy and feminism, one on Cesarean section and a second on the human papaloma virus vaccine.

Helen Hershkoff. In the fall, Helen taught Civil Procedure and in the spring, Federal Courts and the Federal System; her research and writing involved these topics. She participated in two conferences involving the teaching of civil procedure; her papers are published at: "Integrating Transnational Legal Perspectives into the First Year Civil Procedure Curriculum," 56 J. of Legal Educ. 479 (2007); "Poverty Law and Civil Procedure: Rethinking the First Year Course," 34 Fordham Urban L.J. - (2007, forthcoming). With NYU colleague Oscar Chase, she serves as general editor of a forthcoming book, *Comparative Litigation in Comparative Perspective* (co-authors, in addition to Oscar, are NYU colleague Linda Silberman, Vincenzo Varano (University of Florence), Yasuhei Taniguchi (University of Kyoto, emeritus), and Adrian Zuckerman (University College, Oxford University), to be published this summer by Thomson-West.

She continued to work with a group of lawyers, economists, and political scientists from the World Bank and other institutions examining the enforcement of education and health rights in Brazil, India, Indonesia, Nigeria, and South Africa. Their book-length treatment of the subject will be published by Cambridge University Press later this year or in early 2008. She presented a paper, Judicial Capacity and the Enforcement of

Rights to Education, at the World Bank's Workshop on Social and Economic Rights: What Difference Do They Make?, available by podcast at <http://info.worldbank.org.etoools/BSPAN/PresentationView.asp?PID=1953&EID=902> (2006). Helen joined two groups of law professors as amicus curiae in federal law suits involving executive power and national security: *Arar v. Ashcroft* (Second Circuit, concerning federal judicial power to redress allegations of torture caused by the actions of U.S. officials on U.S. soil); and *Al-Marri v. Wright* (Fourth Circuit, concerning the applicability of the federal rules of evidence to habeas proceedings). And she was invited to participate in the Commission on the Legal Empowerment of the Poor (co-chaired by Madeline Albright and Hernando de Soto), an on-line discussion forum on access to justice.

At the law school Helen served as Chair of the Lawyering Personnel Committee and as a member of the Board of Directors of the Brennan Center for Justice. Along with her husband and son, Helen continued to work to launch a new non-profit organization, Party for Humanity, Inc. (for information about Party for Humanity or for reprints of articles, email Helen at helen.hershkoff@nyu.edu).

3. JAMES MADISON LECTURE.

The James Madison lecture is considered the leading annual lecture at NYU Law School. It was founded, in 1959, "to enhance the appreciation of civil liberty and strengthen the sense of national purpose." The lecturers are limited to U.S. Supreme Court justices and judges of the U.S. Courts of Appeals. Fourteen Supreme Court justices and 23 Court of Appeals judges have delivered Madison lectures. Norman has directed the Madison lectures since 1977, and he administers it as part of the Hays Program. The fall 2006 lecture was delivered by Chief Judge Michael Boudin of the First Circuit, speaking on Judge Henry Friendly and the Mirror of Constitutional Law. The 2007 lecture will be delivered by Judge J. Harvie Wilkerson of the Fourth Circuit and the 2008 lecture will be delivered by Judge Marsha Berzon of the Ninth Circuit.

4. THE FELLOWS' NEXT STEPS.

Tricia Bushnell will be joining the law firm of Kirkland & Ellis in Los Angeles, California. Shabnam Faruki is working at the Legal Assistance Foundation of Metropolitan Chicago. Jennifer Friedman will be at the Bronx Defender office as a Kirkland & Ellis Fellow in the Civil Action Project. Rebecca Fisher is clerking for Magistrate Judge Michael Dolinger in the Southern District of New York. Daniel Hennefeld will be in the Honors Program in the Solicitor's Office of the U.S. Department of Labor (NY Regional Office). Sarah Parady is working for the summer at Bantle & Levy, a small, plaintiffs' side employment firm and will be a law clerk to the Honorable Carlos F. Lucero of the Tenth Circuit in Denver from August 2007-February 2009.

5. NEW FELLOWS.

The Fellows for 2007-2008 will be Kristin Connor (Roger Baldwin Fellow), Julie B. Ehrlich (Harriet Pilpel-Planned Parenthood Fellow), Mandy Hu (Tom Stoddard Fellow), John Infranca (Leonard Boudin Fellow), Alex Moulter (Palmer Weber Fellow), and Ian Vandewalker (Deborah Rachel Linfield Fellow). Nicolas G. Arons, Hays Fellow 2003-2004, provided valuable help in the selection process.

6. FIFTIETH REUNION.

The Hays Program will celebrate its 50th anniversary in 2008. As mentioned in the covering memorandum to this report, we are planning a special reunion of all Hays Fellows on May 17, 2008. Please save this date.

7. THANKS.

As noted above, we regret that after 15 years of service Evelyn Palmquist, the Program's secretary and administrative assistant, has left the Program because of a series of health problems. We are deeply grateful for her work and are delighted to report that she will be returning to the Law School in the fall. We appreciate the administrative support provided by John Easterbrook, Helen's faculty assistant. We would also like to thank 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