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**ARTHUR GARFIELD HAYS CIVIL LIBERTIES PROGRAM
ANNUAL REPORT 2011-2012**

As detailed below, this was another busy and productive year for the Hays Program.

Professor Adam Cox has joined the Hays Program as an Acting Director. He joined the NYU faculty in the fall of 2011 after teaching for several years at the University of Chicago Law School. He teaches and writes about voting rights, immigration law, and constitutional law. A graduate of Princeton University and Michigan Law School, Adam began his legal career as a law clerk to Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit. He then served as the Karpatkin Civil Rights Fellow at the ACLU and worked in private practice prior to starting his academic career.

Sadly, three members of the Hays Program family died during the year. Ellen Levine, Fellow in 1978-1979, died after a long illness. She was a writer, publishing books for adults and children on a wide variety of issues all of which had a social message. She also participated in the work of several nonprofit organizations. Michael Rothenberg, Fellow in 1990-1991, had a remarkable gift of institutional development. After working with several organizations, he became executive director of New York Lawyers in the Public Interest, where he greatly expanded the size and scope of its activities. Finally, Jordan Linfield, father of Deborah Rachel Linfield, for whom a Hays Fellowship was named passed away. Jordan and Trudy Linfield became great friends of the Hays Program, and we will greatly miss him as well as the others we lost this year.

This year also marks the appearance of a revised and expanded brochure for the Hays Program. We are enclosing it with the annual report for all Fellows for whom we have addresses, and we will send it electronically to those for whom we have only e-mail addresses. The story of the

Program, which is a great tribute to all of us, recounts its history and contributions to public interest law and specifically civil liberties.¹

As in past years, each semester a former Hays Fellow met with current Fellows before and during dinner to discuss experiences with the Program, career choices, and current issues. Dennis Riordan (Hays Fellow 1973-1974) joined us in the fall. He is one of the most successful appellate criminal defense lawyers in California. Daphne Eviatar (Hays Fellow 1992-1992) spoke with us in the spring. After many years as an independent journalist writing on politics and national security, Daphne is now senior counsel for the Law and Security Program of Human Rights First.

In May, we hosted the annual reception for graduating Fellows and their friends, held this year in a local restaurant. It was a delight to meet the partners, siblings, and friends who have provided support to the Fellows and therefore to the Program. Next spring we will hold a larger reunion.

For further news on the Program, we urge a visit to the Hays website: <http://www.law.nyu.edu/academics/fellowships/haysprogram/index.htm>. The site also provides a link to Lora Hays's video about the Program.

1. THE FELLOWS

The Fellows for 2011-2012 were Greger Calhan, (Robert Marshall), Lauren Jones (Harriet Pilpel), Wonjun Lee (Roger Baldwin), Jessica Rubin-Wills (Deborah Rachel Linfield), Julia Smith (Tom Stoddard), and Jeffrey Stein (Palmer Weber).

The work of the Hays Fellows — always the heart of the Program — reflects the ever-evolving challenges to civil liberties. The rights of immigrants, poverty, racial discrimination, the rights of LGBT people, and criminal justice were the main focus of the Fellows. Jessica Rubin-Wills worked on First Amendment issues. Here is a summary of the work done by the Hays Fellows this past year.

Immigration

Greger Calhan spent the first semester of his Hays Fellowship at the Immigrants' Rights Project of the American Civil Liberties Union. There he worked chiefly on *Lowcountry Immigration Coalition, et al. v. Nikki Haley*, a lawsuit spearheaded by the ACLU which successfully challenged South Carolina's harsh state immigration law. Greger researched and drafted portions of the *Lowcountry* complaint, and later prepared research memoranda in support of the ACLU's successful motion to preliminarily enjoin the law's enforcement. In addition to working on *Lowcountry*, he lent a hand on the similar immigration case *Hispanic Interest Coalition of Alabama v. Bentley*, and also researched *Bivens* remedies in the *Al-Kidd v. Ashcroft* torture accountability lawsuit.

¹ A third enclosure is a one page tribute, recently discovered, by Roger Baldwin, a principal founder of the Hays Program as well as the ACLU, to Arthur Garfield Hays.

In the spring semester, Jeff Stein interned with the Brooklyn Defender Services Immigration Unit, where he assisted staff attorneys in advising public defenders as to the immigration consequences of potential dispositions and helped represent noncitizens in removal proceedings. He also prepared a successful application for Temporary Protected Status on behalf of a Haitian client who was unable to return home due to the aftermath of the earthquake and helped win administrative closure for two children with complicated immigration statuses.

In the spring semester, Jessica Rubin Wells worked at the Immigrant Defense Project, which helps non-citizen defendants avoid the harsh immigration consequences of contact with the criminal justice system. Jessica researched and drafted a guide for attorneys about the Supreme Court's 2010 decision in *Padilla v. Kentucky*, which allows non-citizen defendants to vacate their guilty pleas if their criminal defense attorneys failed to advise them of the deportation consequences. The guide outlines how to bring a post-conviction claim under *Padilla*, including the standard of advice that criminal defense attorneys are required to provide, the ways to demonstrate prejudice, and the retroactive application of the Supreme Court's decision. Jessica also monitored agency and court decisions on two issues significant to non-citizen defendants: the method for defining a "crime involving moral turpitude" that renders an alien deportable, and the time when a conviction becomes final for immigration purposes.

Poverty, Labor and Family Rights

In his second Hays placement, Greger Calhan interned at the Brooklyn Family Defense Project where he assisted Staff Attorney Gabe Freiman in providing legal services to low income parents in family court proceedings. As an overarching, semester-long project, Mr. Calhan worked on a comprehensive mental health memo summarizing applicable case law, parental rights, and potential defenses for mentally ill parents. This included a summary of the APA Child Protection Guidelines with a cross-examination checklist for expert witnesses. Greger also assisted with representation of specific clients, sifting through hospital records for evidence beneficial to family court respondents.

During the spring semester, Julia Smith interned with the Labor Bureau of the New York State Attorney General's office. Most of her time was devoted to three cases, all of which involved the prosecution of employers for egregious wage and overtime violations. She researched the burdens and presumptions that apply when a defendant employer charged with minimum wage violations lacks adequate records of his employees working hours. Julia also conducted research to help the Attorney General prosecute employers for violations of federal prevailing wage.

Racial Discrimination.

Jeff Stein interned with the political participation group at the NAACP Legal Defense and Educational Fund. While he worked on a number of issues ranging from voter ID laws in Texas to the development of "get out the vote" materials for several priority states, the focus of his time was ongoing litigation surrounding procedures for electing representatives to the local school board and board of commissioners in Fayette County, GA. He researched the basis for a court's

authority to enter a consent decree based on an admitted (but not judicially declared) violation of section two of the Voting Rights Act, explored the case law on third-party intervention, answered interrogatories, drafted portions of a memorandum of law that was filed with the court at the time of entry of the consent decree, and called all 159 Georgia counties' board of commissioners office to obtain information about their election procedures and current commissioners.

Wonjun Lee worked with the NAACP Legal Defense & Education Fund, Inc. – Economic Justice Project on the efforts to expand the “ban the box” movement, which refers to the local initiatives to prohibit public employers from inquiring about or considering criminal background check at the initial stage of employment process. He sought to identify a region in the South where LDF could exert its influences with local organizations to help the movement gain support in various forums. His work culminated in an Action Memorandum, detailing possible next steps for the organization and a conference call with a local organization in North Carolina to discuss LDF's potential involvement with the movement.

LGBT Rights.

In the fall semester, Lauren Jones interned at the Sylvia Rivera Law Project, where she worked on direct services, litigation, and policy for transgender, gender non-conforming and intersex people who are low-income or people of color. At SRLP, Lauren worked on litigation and policy advocacy to end New York State's ban on Medicaid coverage for transition-related healthcare. As part of the policy advocacy on that issue, she co-wrote a Huffington Post article with attorney Pooja Gehi on the importance of ending that ban and providing care to transgender New Yorkers. She also advocated for clients in prison and in the foster care system who were denied access to healthcare. She also helped several clients who were seeking name changes.

During the fall semester, Julia Smith interned with the LGBT Rights Project of the ACLU. Under the supervision of staff attorney Amanda Goad, she conducted legal research to help assess various proposed legal strategies for protecting transgender youth in schools. She focused on evaluating the strength and viability of claims under Title IX and the Individuals with Disabilities Education Act. In addition, Julia helped draft an amicus brief to the Montana Supreme Court on behalf of Montana clergy in a suit seeking relationship and family protections for same-sex couples.

Criminal Justice.

Lauren Jones interned at New York County Defender Services in spring 2012. NYCDS represents low-income people charged with crimes in Manhattan. At NYCDS, Lauren observed arraignments, jury selections, and both felony and misdemeanor trials. She wrote legal research memos discussing the use of a statute that prohibited blocking movement in the subway system to arrest someone for holding the subway car doors open, as well as the evidentiary use of field tests for a Driving While Intoxicated charge.

In the spring Wonjun Lee worked on *United States v. Jones*, in which the Supreme Court, in 2012, held that attachment and use of a GPS device on a vehicle constituted a Fourth

Amendment search. His work, at the American Civil Liberties Union – Speech, Privacy & Technology Project, culminated in a memorandum of law on whether a warrant must be obtained for this type of search. He helped edit a number of amicus briefs arguing that a warrant search via use of a GPS device was unconstitutional. In addition, he researched First Amendment implications—in particular, as a prior restraint—of an order placed on subpoena recipients, prohibiting them from disclosing the existence of such subpoena.

First Amendment.

As the Deborah Rachel Linfield Fellow in Freedom of the Press, Jessica Rubin-Wills spent the fall semester focusing on First Amendment and privacy issues at the ACLU. Jessica worked with attorneys in the Speech, Privacy, and Technology Project, where she researched the application of traditional First Amendment doctrines to speech on the Internet. She also supported the ACLU’s attorneys in ongoing federal litigation to demonstrate that the suspicionless search and seizure of electronic devices at the border violates the First and Fourth Amendments. In addition, Jessica assisted with the ACLU’s *amicus* brief to the Supreme Court in *United States v. Jones*, which held that the attachment of a GPS tracking device to a car constituted a search under the Fourth Amendment.

2. THE DIRECTORS.

Norman Dorsen. Norman continues to divide his time between law school duties, including the Hays Program and the James Madison lecture, and service as counselor to NYU President John Sexton. He is currently chairing on a study of University inter-school programs (public health, cities and the environment, data science and statistics, and certain humanities programs). At the Law School he again taught a seminar in Judicial Biography and Opinions.

After 20 years, Norman stepped down from the board of The Thomas Jefferson Center for the Protection of Free Expression (in Charlottesville, VA). He continues as a member of the National Advisory Council of the ACLU. He has also joined two boards in Litchfield County, where he has spent time for many years – the Lakeville Journal (the community newspaper) and the Cornwall Historical Society.

When Professor Joseph Weiler succeeded Norman as editor-in-chief of the International Journal of Constitutional Law (“I.CON”), which Norman founded in the late 1990s, he decided to devote two issues of the journal “in homage” to Norman. The first issue included ten non-American scholars, who each discussed briefly the ten books that most influenced their intellectual growth. Norman wrote a “response” in which he commented on the selections and underlying premises of each of the authors. 8 I.CON at 509. The second issue repeated the pattern for ten U.S. scholars, including Norman. He presents his selections and also comments on those of the other nine. He also wrote a preface to *Gay Pride vs. the City of Minneapolis*, a book about one of the first cases that overcame official obstacles to a celebration of gay identity.

Sylvia A. Law. Sylvia taught Health Law and led a health policy seminar in the fall semester. *Law and The American Health Care System* (with Sara Rosenbaum of George Washington and Rand Rosenblatt and David Frankfort of Camden Law School) was published in June 2012, just in time to need revision in light of the Supreme Court's decision on the Affordable Health Act. In the fall semester, as chair of the Sheinberg Scholar in Residence Program, she helped to organize a law school program featuring Debbie Almontaser, who spoke on "Arab Culture and Islam: Challenges in Diversity Education." She gave the Inaugural Lecture for the program on Health Policy & Law at Northeastern Law School, on the topic, "Tax Payer Conscience and Health Care Reform." She continues to serve on the boards of the Center for Reproductive Rights and the Center for Law and Social Policy. She worked with Compassion and Choices to promote reform on end of life choice in Hawaii and helped to organize sessions on these and other issues at the International Law and Society Conference in Honolulu in June.

In the spring, Sylvia taught Constitutional Law. At the Law School, She continued to serve as chair of the Faculty Committee on Career Services, during a challenging period. She worked with others on a major study, funded by New York State, examining the mergers of Catholic and sectarian hospitals in New York.

Helen Hershkoff. This year Helen was on sabbatical. She participated in a number of conferences and workshops. As faculty supervisor to the Journal of Law and Public Policy, she helped organize a conference co-sponsored by the Hays Program on Access to Justice. She also helped plan and presented remarks at two conferences held for state court judges organized by The Aspen Institute Justice & Society Program, "U.S. State Courts: Learning from Other Jurisdictions"; presented a paper at a conference, "Boundaries of Rights: the State, Private Actors and Positive Obligations," organized by the Cambridge University Faculty of Law Centre for Public Law and Queen's University; served on the Planning Committee for a conference sponsored by the Task Force to Expand Access to Civil Legal Services in New York; and met with representatives of the Legal Resources Centre (South Africa) to plan its 2013 conference on socio-economic rights. A number of Helen's essays were published this year: *Horizontality and the "Spooky" Doctrines of American Law*, 59 Buffalo L. Rev. 455 (2011); *Shady Grove: Duck-Rabbits, Clear Statements, and Federalism*, 74 Albany L. Rev. 1703 (2011); *Contracting for Procedure*, 53 Wm. & Mary L. Rev. 507 (2011) (with Kevin Davis); *State Courts and Constitutional Socio-economic Rights: Exploring the Underutilization Thesis*, 115 Penn State L. Rev. 923 (2011) (with Stephen Loffredo); chapters on the U.S. as party in the Federal Practice and Procedure treatise; and a Rules Supplement and update to the Tenth Edition of the Friedenthal, Miller, Sexton and Hershkoff civil procedure casebook. Helen also joined the Brief of Civil Procedure Professors as Amici Curiae in Support of Petitioners, in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. 2011). Finally, two state courts cited her articles on state constitutions in judicial decisions involving standing and socio-economic rights.

Adam Cox. During his first year at NYU, Adam taught a course on immigration law and the rights of noncitizens. He presented papers at a variety of workshops and conferences, including the faculty workshops at Chicago, NYU, Texas, and Alabama, as well as Chicago's Law and Philosophy workshop. He also helped organize a conference at Chicago on immigration and institutional design.

Adam completed work on two projects this year: Delegation and Immigration Law, *University of Chicago Law Review* (2012) (with Eric A. Posner); and Reconsidering Racial and Partisan Gerrymandering, 78 *University of Chicago Law Review* 553 (2011) (with Richard T. Holden). He also continued working on papers about the role of equality in immigration law and the significance of exit opportunities in constitutional law. Along with Tom Miles, he embarked on a large-scale empirical study of a new federal immigration enforcement initiative known as Secure Communities.

The move to New York required Adam to resign his position on the Board of the ACLU of Illinois, but this spring he joined the board of the Brennan Center for Justice.

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. Fifteen Supreme Court justices and 28 court of appeals judges have delivered Madison lectures. Norman has directed the Madison lectures since 1977, and it is administered as part of the Hays Program. The fall 2011 lecture was delivered by Hon. Robert Katzmann of the Second Circuit. The 2012 lecture will be given in October by Judge Karen Nelson Moore of the Sixth Circuit.

4. THE FELLOWS' NEXT STEPS. .

Greger Calhan will work as the Karpatkin Fellow at the ACLU. Lauren Jones will clerk for Judge Tucker Melancon in the Eastern District of New York. Wonjun Lee is clerking for Magistrate Judge Jay Francis of SDNY. Jessica Rubin-Wills will work at Advocates for Children of New York as a Kirkland and Ellis Fellow and, the following year, will clerk for federal Judge Allyne Rose of the Eastern District of New York. Julia Smith is clerking for Justice Mark V. Green of the Massachusetts Appeals Court. Jeffrey Stein will work at the Public Defender Office of the District of Columbia.

5. NEW FELLOWS

In 2012-2013 the Fellows will be Brian Chelcun (Tom Stoddard), Jared Davidson (Deborah Rachel Linfield), Anthony Enriquez (Roger Baldwin), Elizabeth Jordan (Palmer Weber), Richard Sawyer (Robert Marshall), Heather Vail (Leonard Boudin), Emily Winograd (Harriet Pilpel).

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

We again express our thanks to Gail Thomas for her dedicated work as administrative assistant and secretary to the Hays Program. We also thank Robert Anselmi and Hetty Dekker for their administrative support.

Norman Dorsen
Sylvia A. Law
Helen Hershkoff
Adam B. Cox

PLEASE KEEP IN TOUCH WITH THE HAYS PROGRAM

We try to maintain up-to-date contact information for all Fellows. If your contact information has changed, please be sure to send us the new data either by email to gail.thomas@nyu.edu or mail your updated information to NYU Law School, Attn: The Hays Program VH 308, New York, NY 10012.

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Email address

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Professional title if any

Business address

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