

ARTHUR GARFIELD HAYS CIVIL LIBERTIES PROGRAM
ANNUAL REPORT

1971-1972 (re-created)

The Hays Fellows this year were Peter T. Bepler, William Birtles (Robert Marshall Graduate Fellow), Connie Carden, Eric Lieberman (Graduate fellow), Jack Novik, Ronald H. Shechtman, and Michael Wolf. Jack died in mid-career as an esteemed public interest lawyer with the ACLU and other groups, from illnesses believed to be related to his military service in Vietnam.

Connie Carden worked with Marcia Robinson Lowry (Hays Fellow 1968-1969) and Rita Dickstein at the NYCLU, contributing to *Wilder v. Sugarman*, 385 F. Supp. 1013 (1974), the landmark child welfare lawsuit charging both public and private foster care agencies with unconstitutional policies resulting in systemic discrimination against African-American, Protestant children. The lead plaintiff, Shirley Wilder, was a 13 year old girl who was refused foster care placement in a system that allowed sectarian institutions to accept children only of their own faith. As a result of such policies, Shirley Wilder ended up in a series of substandard state-run institutions, where she was repeatedly abused.

Connie also worked with Alan Levine and Burt Neuborne on behalf of plaintiff Bruce Severy, a North Dakota teacher, writer, and poet, in a challenge to the banning of Kurt Vonnegut's *Slaughterhouse Five* and *Deliverance*, and of other books in a Fargo, North Dakota school. The case ended in settlement. Connie writes that she still has "a great photo taken by Jill Kremetz of Burt, Alan, Kurt Vonnegut, Bruce Severy, and myself" to commemorate the case and her work on it. She also worked on behalf of prisoners, alongside David Rudenstine (Hays (Field) Fellow 1968-1969) at the NYCLU, and did work on the annual supplement on discrimination in education for the casebook, *Political and Civil Rights in the United States*.

Eric Lieberman writes, "Those years were quite eventful from a political point of view. The Vietnam War was still raging; the antiwar and anti-draft movements surged; the prisoners at Attica rebelled, and were brutally repressed; the 1972 elections witnessed the rise and fall of George McGovern and the landslide re-election of Richard Nixon; the John Mitchell Justice Department tried and ultimately failed to stop the publication of the Pentagon Papers; the Harrisburg Antiwar Conspiracy case was tried; Ellsberg was indicted; the seeds of Watergate were planted; and two giants of the Supreme Court – Justices Hugo Black and John Marshall Harlan – retired and died, to be replaced by Lewis Powell and William Rehnquist. The political and social atmosphere was both invigorating and toxic."

Eric worked mainly on ACLU amicus briefs in the Supreme Court, contributing the first draft of five such briefs. His first assignment was the cert petition in *Rosengart v. Laird*, 449 F.2d 523 (2d Cir. 1971), on behalf of Oliver "Ollie" Rosengart, a clinical law teacher at NYU School of Law who had lost his claim to in-service conscientious objector status in both the

district court and the Second Circuit. Eric writes that, much to his surprise, several weeks after the brief was filed, “We received a response from the Solicitor General conceding error and requesting the Court to vacate and remand. Shortly after, the Supreme Court did just that, over the dissents of Justices White and Rehnquist, who criticized the Solicitor General for conceding error.”

Eric also drafted an amicus brief in *Weber v. Aetna Insurance Co.*, 406 U.S. 164 (1972). Weber, a poor woman in Louisiana, claimed that Louisiana law unconstitutionally denied her Workman’s Compensation insurance benefits on the basis of her “illegitimate” (i.e., non-marital) birth. Eric recalls that he was pessimistic about the likelihood of success in Weber given the composition of the Court, even though the Court in *Levy v. Louisiana* U.S. (1968), on which several Hays Fellows worked (see Gray and Rudovsky, *The Court Acknowledges the Illegitimate*, 118 U. Penn. L. Rev. 1 (1970)), had invalidated the Louisiana Wrongful Death statute that discriminated against nonmarital children, the first such holding in the Supreme Court. He further remembers that Norman encouraged him “not to make such negative assumptions,” pointing out the “numerous civil liberties victories that had been won in the late fifties and sixties by winning support, albeit sometimes narrow” from justices who were not known for strong civil liberties views. Weber did prevail in the Supreme Court.

Eric further writes “that after the Rosengart and Weber cases, it seemed to me that the practice of law was remarkably easy and fulfilling. [Norman] warned me not to expect the same things to happen very often. Little did I know.”

Eric also drafted an amicus brief in *Apodaca v. Oregon*, 406 U.S. 404 (1972), a challenge to the constitutionality of an Oregon law allowing criminal defendants to be convicted by less than unanimous jury votes – specifically by 10 to 2 votes. The case was joined with *Johnson v. Louisiana*, a similar challenge to a Louisiana law allowing criminal defendants to be convicted by votes of 9 to 3. The Supreme Court upheld the constitutionality of both laws.

Eric’s amici drafting extended to a brief in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), brought by a group of members of Congress seeking the release, under the Freedom of Information Act, of a series of documents prepared for the President concerning a scheduled underground atomic test. Finally, Eric drafted an amicus brief in *Gomez v. Perez*, 409 U.S. 535 (1973), another challenge to a state law, this time in Texas, denying equal benefits to non-marital children.

Eric also worked on *Atlee v. Laird*, 347 F.Supp. 689 (D.C.Pa. 1972). The seven named plaintiffs had filed a lawsuit challenging the constitutionality of the war in Vietnam and asking the Court “essentially to declare the illegality of the war and to enjoin permanently the expenditure of funds supporting the war, the spending of money for weapons that may be found illegal under the international rules of war, and the use of military tactics that may violate those rules.” The case, which was heard before a three-judge district court in Philadelphia, was one of the last challenges to the legality of the war, all unsuccessful.

In addition to his litigation, Eric drafted several legal memoranda for Norman's use in writing *Disorder in the Court*, and, at the request of Stephen Gillers, Hays Fellow 1967-1968, he wrote a first draft of a law review article on the question of the due process right of access to the judicial process, following *Boddie v. Connecticut*, 401 U.S. 371 (1971) (invalidating filing fees for divorce), and *In re Kras*, 401 U.S. 434 (1973) (upholding filing fees for bankruptcy).

Ron Schechtman worked with Alan Levine on the NYCLU Students Rights Project writing memoranda on procedural points for impending litigation. Ron also prepared a memorandum for Alan and Larry Sager concerning the equal protection problems involved in the proposed school accountability system that was, at the time, being designed for the New York City school system.

Ron also worked with Mike Krinsky on *New York Times Co. v. U.S.*, 403 U.S. 713 (1971) ("the Pentagon Papers" case). The Pentagon Papers, leaked to the Times by Daniel Ellsberg, exposed extensive government deceit and manipulation in the pursuit of the Vietnam War, and their publication is widely believed to have accelerated the ending of the war. Ron abstracted cases from the Government's answering papers to the discovery motions filed on behalf of Daniel Ellsberg, whose office was broken into by agents of President Nixon. He also prepared a memorandum on the intent requirements in common law larceny. In doing so, Ron joined Norman and many of the Hays Fellows in this landmark case

Ron worked with the ACLU Free Speech Committee under the supervision of Alan Reitman and Trudy Hayden, where he prepared a memorandum on the free speech and association issues raised by the federal statutory requirements of disclosure of contributors to lobbying groups (including the ACLU). He also researched and reported on First Amendment problems concerning the authority of the Food and Drug Administration and the Federal Trade Commission to review, limit and confiscate publications concerning certain products and to withhold authorization for research. Ron also prepared a memorandum on executive authority and regulations for the classification of information and materials as well as a memorandum for Alan Reitman on a model election law.

Mike Wolf worked with Leonard Boudin and Mike Krinsky on The Pentagon Papers case, researching common law larceny as it relates to the photocopying of documents and the theft of trade secrets.

In addition, Mike worked with Bruce Ennis at the ACLU, researching the right of mental patients to refuse treatment on medical grounds, in preparation for a brief opposing a grant of certiorari. Mike continued his work with Bruce on a trial memo in a case challenging Florida's mental commitment procedures. The case made its way to the Supreme Court in 1975 as *O'Connor v. Donaldson*, 419 U.S. 894 (1974), vacated, 422 U.S. 563 (1975). On remand, the Fifth Circuit held that a finding of mental illness alone cannot justify the indefinite commitment of an individual.

Mike also worked with Joel Gora of the ACLU on *Mattis v. Kistling*, a challenge to a Missouri statute authorizing the police to shoot any fleeing felon, and he assisted the Due Process Committee on a number of issues including the efficacy and legality of expert opinions in mental commitments, the police use of deadly force, and the procedures used in mental commitments.