

TRIBUTE TO NORMAN DORSEN

I am honored to have the opportunity to write about Norman Dorsen. My relationship with Norman began when I was a law student. I am one of some 200 people who have been Arthur Garfield Hays fellows (or fellowettes), a program created by Norman Dorsen at New York University School of Law. When I was a “Hays,” Norman ran the program with Professor Sylvia Law; more recently, they have been joined by Professor Helen Hershkoff. I am therefore the recipient of a very special education, and I will sketch briefly some of what I have learned as a student of Norman’s.

A word of explanation is in order about the Hays Fellowship. In 1958, a fund was endowed at NYU School of Law in honor of Arthur Garfield Hays, the great civil libertarian. Since then, a small number of third-year NYU students annually are chosen as “Hays Fellows.” As a Hays, one receives money towards tuition as well as course credits, and one does a mixture of academic research and hands-on work on issues such as free speech or welfare rights. Hays fellows have helped on many cases that went to the Supreme Court (such as *Flast v. Cohen*,¹ the Pentagon Papers litigation,² and *United States v. Nixon*³), as well as on thousands of lawsuits in the lower courts, on topics from discriminatory denial of homeowners insurance, to unlawful limitations of access to abortion, to refusals to treat HIV patients.

While I was a Hays, in 1974-75, I worked on a First Amendment book burning case, under the tutelage of Burt Neuborne and Alan Levine, who were then at the American and the New York Civil Liberties Unions. The case emerged from a small city in North Dakota—Fargo—whose school board had banned several books, including *Slaughterhouse Five*, by Kurt Vonnegut, and *Deliverance*, by James Dickey. Townsfolk made miserable the life of the teacher who had assigned the books. One of my tasks was to digest depositions, and the record I read seemed more like a novel that Vonnegut might have written than real life. For example, the city had a local group, a Button and Bows Society, to which the teacher’s wife had belonged; she was excluded after the school children were assigned *Slaughterhouse Five* to read. In one transcript I read, a woman deposed asked the New York Civil Liberties Union lawyer why he had a beard. He responded, without missing a beat, that his

1. *Flast v. Cohen*, 392 U.S. 83 (1968).

2. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

3. *United States v. Nixon*, 418 U.S. 909 (1974).

mother wondered about that as well. During the litigation, Kurt Vonnegut became personally involved, and one of the highlights of my student days was to meet him and have the moment recorded in a photograph taken by Jill Krementz.

Most of the work was, of course, far less glamorous. I spent hours in the law library doing research to help create the supplement for *Political and Civil Rights in the United States*,⁴ a volume first begun in 1952 by Thomas Emerson and David Haber, who in 1967 were joined by Norman Dorsen. By the 1970s, Emerson, Haber and Dorsen's *Political and Civil Rights in the United States* had grown by thousands of pages and required regular supplementation. Not only was the growth itself a tribute to the work of Norman Dorsen, who was also by then leading the American Civil Liberties Union, the subsequent decision to stop supplementing the book was yet another tribute: the subject matter had permeated so many fields of law that it could not be contained within any given two-volume set. Norman and the ACLU turned to other forms of publication, such as series of works on the rights of women,⁵ the rights of employees,⁶ and even the rights of lawyers (by Steve Gillers, of course).⁷

Those who worked on these projects technically were not all Hays fellows. Some had other titles, all evidence of Norman's fundraising skills and his understanding of how important it was to give honor to many people who had been constitutive of the civil rights-civil liberties community. Some were thus Robert Marshall fellows, Roger Baldwin fellows, Harriet Pilpel fellows, Reed Foundation fellows, Palmer Weber fellows, and more recently Tom Stoddard fellows.

While such fellowships now span 40 years, what we all have in common is what we learned under Norman's tutelage. I provide but a few of the many lessons that he taught. First, Norman teaches action. Action may sound like something one cannot teach, but Norman did. He knew about "multi-tasking" long before it became a buzz word, as he worked simultaneously in several modes, litigat-

4. THOMAS I. EMERSON, DAVID HABER & NORMAN DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* (1967).

5. SUSAN DELLER ROSS ET. AL., *THE RIGHTS OF WOMEN: THE BASIC ACLU GUIDE TO WOMEN'S RIGHTS* (Norman Dorsen ed., 3d ed. 1993).

6. WAYNE N. OUTEN ET. AL., *THE RIGHTS OF EMPLOYEES AND UNION MEMBERS: THE BASIC ACLU GUIDE TO THE RIGHTS OF EMPLOYEES AND UNION MEMBERS* (Norman Dorsen ed., 2d ed. 1994).

7. STEPHEN GILLERS, *THE RIGHTS OF LAWYERS AND CLIENTS* (Norman Dorsen ed., 1979).

ing, organizing, and lobbying, all with a common purpose: to make the world better for people who were not like himself.

Norman is an organizer par excellence. If the Hays Program is one example, a second is the Society of American Law Teachers (SALT), which he helped to create in the early 1970s. He saw that, while law schools had an organization, the American Association of Law Schools (AALS), law teachers did not, and moreover, that law teachers had common concerns about who had access to legal education and what its content could be. When first conceived, SALT stood as an outsider to the AALS, but over the years, many of the issues first embraced by SALT—such as the need to diversify the student bodies and faculties of law schools—became constitutive of the AALS. Appropriately, Emma Coleman Jordan was the first to have been both the president of SALT and then, subsequently, the president of the AALS.

Thus, a first lesson was about action, that it could take many forms, and that it had to be imaginative and generative, ahead of current conversations. Norman's second lesson was not only to act creatively, but to organize such action in a fashion that interacted with extant institutions and generated new ones. One of Norman's most famous constitutional victories identifies him as a person fighting institutionalization. *In re Gault*,⁸ which he argued in the United States Supreme Court, stands as a landmark to prevent children from years of incarceration through the juvenile "justice" system. Yet, even as Norman fought institutions and institutionalization, he himself was—and is—an institution maker, builder, and perpetuator.

I should also add that I not only learned from Norman about the importance of grounding work in institutions, I have also followed as best I could his lessons. As I helped to shape the Arthur Liman Public Interest Program and Fund at Yale Law School where I teach, I had Norman's model in mind. Thus the program at Yale includes both student and graduate fellows, programs, colloquia, publications, and projects. We have convened major conferences on legal services, changing rights of workers, welfare regulation, and criminal justice. We have supported graduate fellows working on advocacy for the institutionalized elderly and on rights of non-United States citizens on the Texas border, and our student fellows have drafted manuals on how to continue receiving welfare benefits while attending school and have made films on how teenagers can

8. 387 U.S. 1 (1967).

respond during police encounters. Norman's example provides me with constant reminders of what else we might also be doing.

The Hays fellowship is not only a program that transforms the third year of law school for students at NYU, it is an institution in our lives beyond law school. Every five years, Norman and Sylvia organize reunions, plucking us back into the civil liberties fold. They are wise to do so, because some of us may lapse into ambivalence towards some of the civil liberties approaches with which we were raised. An obvious example is hate speech, but there are others. What I like about Norman is that he is textured; he knows that the issues are hard, and he is open to exploring controversy. For the 30th anniversary of the program, he and Sylvia asked: about what civil liberties issue have you most changed your mind since in law school? At the 35th anniversary, the discussion was about conflicts between rights, such as the debate about the role of speech in the context of Title VII of the Civil Rights Act and in the context of protests about abortion and access to it. Norman is willing to name and face such conflicts. He does not undersell the other side of the story, and he is willing to recognize the pain, even as he takes a position.

The topic of the 40th anniversary reunion was the relationship between civil liberties and human rights. That topic illuminates a third Norman Dorsen lesson: Don't assume that the issues and the answers remain the same. In the 1980s, Norman Dorsen began to appreciate the breadth of transformations outside the United States, the growth of constitutionalism in many countries, the role of globalization in the economy, and its relevance for law schools in the United States and for civil liberties everywhere. Once again ahead of—and creating—the curve, he (joined and supported by John Sexton) began to shape the Global Law School Program that has since become emblematic of NYU Law. Further, Norman immersed himself in the work of international human rights, through the Lawyers Committee for Human Rights and through the creation of the International Association of Constitutional Law, with its United States branch. In 2001, he helped to launch *I-Con*, a new international journal of constitutional law, to be published by Oxford University in conjunction with NYU's Global Law School Program.

If a third lesson is thus flexibility and foresight, a fourth is friendship. Norman teaches a lovely amalgam of camaraderie and networking. Organizing Hays events is but one example. (After they are held, he sends pictures.) But he does not only remember you on five year intervals. He'll call you up and suggest you get in

touch with someone; he'll put you on a committee, have someone ask you to write a brief or a law review article. Norman also makes time for a visit and keeps track of events, from life events to work projects—sending notes, hand-typed or scribbled and, more recently, by email. A good many of the connections are to rope you in to do work in some form or fashion, and this is work mixed with friendship. Norman's networks are not limited to students and law professors; they extend to all with whom he worked. For example, at one Hays reunion, Norman organized a memorial service in honor of Dede Fuchs Carson, the Hays administrative assistant from 1963-67; her family and the fellows who knew her came together to mark her contribution to civil liberties work.

Norman thus teaches accessibility. When you call him on the phone, half the time he answers the call himself. If you do get an assistant on the line, he or she does not ask who you are and why you are calling. Norman takes calls without having them screened to ensure that one crosses some invisible threshold of importance.

In terms of focus, it was obvious from Norman that students are people he takes seriously. The opening of the brochure on the Hays program states that the "core of the program is the students." Each year, Norman and Sylvia send out a list of current activities, describing in detail what each current Hays fellow is doing. By telling us their names and what they are working on, we are reminded, yearly, that what matters is continuing work, by new young lawyers, committed to engendering rights.

Norman not only promotes and focuses on the work of students; Norman invites students to be his peers. Since becoming a law professor, I have appeared on programs and conferences with others who have been my teachers. I have noticed that some insist on reasserting that role, figuring out a way to remind the audience that I was their student, and thereby, in some sense, attempting to cast me in that role once again, to make me their junior. But never Norman, who treated me like a peer when I was a student and who has treated me like a peer ever since. When I visited at NYU in 1996-1997, I watched with delight and amusement as Norman presided over a Hays dinner and current fellows disagreed with much of what he had to say—proof positive of his continued commitment to forms of equality rare in the academy.

This brings me to another aspect of what Norman has taught. I am one of many in a subclass of Hays fellows/fellowettes who teach law, including Sylvia Law, Liz Schneider, Marty Guggenheim, Steve Gillers, Sue Deller Ross, Dan Pochoda, David Rudofsky, and so many others. It was not until I was teaching, and teaching for a

while, that I understood one other gift from Norman, one other reason for admiration. He openly embraced a rights-based agenda for all of humanity, he did it while teaching constitutional law, and he therefore had to pay the price that some would discount his scholarship because he was honest and forthright about his goals to better the world.

I have discussed at length Norman's activism. In the legal academies in which many of us make our homes, such activism is not always celebrated. While none of us can point to a scholar without an agenda, without political views that are at the core of that person's scholarship, many of our colleagues make a claim to occupy a scholarly space outside of their political and social vision. Norman openly tied his scholarship to his viewpoint, and he did so in an era of constitutional scholarship quite taken with "neutral principles" and "passive virtues." Once I became a law teacher, I learned firsthand what I had been unaware of as a student, something important about who Norman Dorsen is. It was not cost free then (and it is still not cost free now) to make the choice he did, not only to accept the label activist but to take it on, wear it, and demonstrate to all of us the value of doing so.

In a recent essay in a symposium on the "Justice Mission of American Law Schools," Norman wrote that three elements were required of a law school in order for him to be proud of it as a place.⁹ He aspires—he told us—to work in an institution that has "quality, variety, and heart." Quality he defines as "intelligence, rigor and wit." Variety means for him a range of scholarly interests, intellectual styles, and programs. For Norman, "heart" is a "moral conception of the law, an approach that takes into account the human consequences of legal rules and structures."

Norman has all the elements that he has called for in institutions. He has them, and he has taught others to join with him in creating such institutions. Thus, I offer my heartfelt thanks to Norman, and I am grateful to the *NYU Annual Survey of American Law* for giving me the opportunity to have the occasion to say so in print.

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9. Norman Dorsen, *An Agenda for Social Justice Through Law*, 40 CLEV. ST. L. REV. 487, 491 (1992).