

ARTHUR GARFIELD HAYS CIVIL LIBERTIES PROGRAM
ANNUAL REPORT

1973-1974 (re-created)

The Hays Fellows this year were Carolyn Sternschein Henneman, Wayne N. Outten, Dennis P. Riordan, Adina L. Savin, Barton F. Stichman (Robert Marshall Fellow) and Jonathan Strong. Norman's letter of April 6, 1977, to Howard Dressner, secretary and general counsel of the Ford Foundation, includes the work of the Hays Programs in 1973-1974, as well as the two succeeding years.

Throughout the year the Watergate scandal was unfolding – especially after President Nixon induced Robert Bork, the Solicitor General, to fire the Watergate Special Prosecutor, Archibald Cox, which turned public opinion sharply against the President. A key legal and political issue was whether the president was required to hand over to the special Prosecutor certain tape recordings made in the Oval Office. The case reached the Supreme Court and, in August 1974, the Court decided the Nixon Tapes case, holding that he did have the obligation. Norman helped write the ACLU amicus brief (it was over the summer, so Fellows did not work with him). President Nixon resigned soon after the tapes became public. The Vietnam war was then moving into its last stages.

Wayne Outten wrote, “To the best of my recollection, the main thing I did during my Hays year was to work on updating Norman's book, Political and Civil Rights in the U.S. In fact, I recall that I had not finished reading something I was supposed to do when I left for Oregon to clerk for Judge Solomon, so I spent some time when we first got to Oregon finishing the job.

“I don't recall having an external assignment to an organization or law firm during my Hays year. If I did, it must've been with the NYCLU and I'm blurring it with my summer internship there. At the NYCLU, I worked with Joe Gora, Marcia Lowry, and Marilyn Haft on some cases and research. I remember doing a 50-state survey on an aspect of adoption laws.

“I also remember attending some really special dinners with the Hays group. While I recall that the food and wine were usually very good, what made the dinners special was the opportunity to talk informally and personally about interesting stuff.”

Dennis P. Riordan wrote, “My introduction to the Hays Program was inauspicious: I misspelled the fellowship's name (“Hayes”) on my application, a fact made frostily clear to me by Norman at the outset of my interview. Perhaps Steve Gillers and Sylvia Law, also on the interview panel, took pity on me.

Most of my Hays year has faded into memory's mists, but at least one lesson has remained with me and, I think, done much to shape the work that I've done since. I had spent the summer before my third year on a LSCRC grant helping to organize a joint defense for the

inmates charged in the 1972 prisoner revolt at Attica Prison in upstate New York. Paul Chevigny, then at the NYCLU, had joined the team of Attica attorneys, and I was assigned to work with Paul in the fall of 1973.

“Paul had recently published his book “Police Power,” in part concerning his representation of political radicals entrapped by undercover provocateurs into joining police-orchestrated criminal schemes. Paul’s work had been criticized as having no obvious link to the protection of civil liberties, especially since the conduct of the defendants involved was hardly beyond reproach. But Paul’s focus in these cases in challenging police overreaching on due process grounds was on limiting state power. Liberty operates, he believed, where the government is forbidden to venture.

The perspective stuck with me, and it’s a major reason I’ve continued to do criminal defense work. Just as a government that cannot prohibit speech is less dangerous than one that can, so too is a government that cannot imprison without jumping through the considerable hoop of providing a defendant with a lawyer and fair trial. Apropos of the teaching of “Police Power,” the anti-terrorism prosecutions brought since 9/11 have proved, in the majority of (but not all) cases, to be based on government-sponsored efforts to generate criminal activity rather than on successful efforts to detect it. I thank the Hays (sans “e”) Program for the real world education it provided me.”

Adina Savina wrote us, “My first memory of 1974 is that Vietnam was still very much a dark shadow, coloring much of our thinking – and the country’s. We were young, idealistic students, entering our final year of law school, and eager about what was going to await us when we graduated. We met often and discussions were lively as we reported on the various internships Norman had arranged for us with outside groups.

“The clinic with which I was initially placed had a criminal law focus and one of my very first duties was to do intake with potential clients. I remember sitting in a room that was the size of a small closet, bare of furniture except for two classroom-like chairs. The space was so small that my knees were almost touching those of the first person I interviewed. As it turned out, he had just been released from prison and I believe he was seeking help in getting his first new job. He very calmly explained to me how he had gone to a club, picked up three women and murdered them in his car in a drunken rage. He was also very matter-of-fact about explaining that his prison-based psychiatrist believed the murders were due to deep-seated anger at his father. I remember trying very hard not to betray any of my personal reactions to this information but, as I continued my questioning, I also found myself inching backward as much as possible in my chair and hoping that he really had been successfully rehabilitated.

“Another task was to assist with legal research for a brief that was being prepared in connection with a lawsuit. Later in the year, I was invited to attend when it was argued at court. This was my first time in court and my first occasion to be, however loosely and indirectly, apart of a litigation team. I remember being impressed with all of the arguments that were made, and especially gratified because the attorney representing the clinic was also a female – something that was still a bit exotic.

“Later, I was assigned to a different group, one involving women’s rights and which I believe was either a part of, or somehow sponsored, by the ACLU in NYC. I remember doing research in the NYU law library on the right of women to retain their original identities under various state laws following marriage and how women in certain states were required to take legal action in order to re-establish their maiden names as their legal identities following marriage.

“ In the latter part of our Fellowship year, I worked on the first volume of the fourth edition of the book, Political and Civil Rights in the United States, by Norman, Paul Bender of Pennsylvania Law School and Burt Neuborne, who had recently joined the NYU Law School faculty. My topic was the still emerging concept of the public’s right to know and the Freedom of Information Act.

“When I took the California bar some months later I had good reason to be happy that you had assigned me to the legal internships that you had while I was a Hays Fellow. The constitutional law essay questions asked me to analyze and present the arguments for or against whether a state statute was constitutionally sound and enforceable. I vaguely remember that the fact pattern concerned a mother who had been arrested for breast-feeding either in a public space or in a restaurant. What I am certain about is that I read and re-read the statute in the exam booklet at least three times to an effort to be sure that I was seeing what I thought I was seeing. Then I started to write furiously, opening with sentence: ‘As the United States Supreme Court has already declared, this statute is unconstitutional for the following reasons ...’ I was being examined on the exact same statutory language that I had researched at length in one of my Hays Fellow internships!”

Carolyn Sternschein (Henneman) worked on several matters with John Shattuck, national staff counsel at the ACLU, including *Forcade v. Knight* in which the ACLU was seeking discovery and preparing for depositions. She also assisted Norman on the fourth edition of *Political and Civil Rights in the U.S.*

Bart Stichman worked on an ACLU case, *Anderson v. Murphy*, on appeal to the Second Circuit, concerning what defenses, if any, are available to a state police officer in a 1983 action for money damages for violation of the plaintiff’s Fourth Amendment rights.

Bart also wrote at least two other memoranda for the Legal Aid Society. The first concerned what behavior of a witness is sufficient to support a federal criminal contempt charge and possible defenses to such a charge. The second addressed federal issues arising from the systemic denial of criminal defendants’ statutory rights to a timely preliminary hearing of release from custody.

For the NYCLU, Bart gathered facts, interviewed witnesses, drafted a complaint and conducted research on legal issues for a suit for violation of state statutory and constitutional rights of a person involuntarily committed to a state mental hospital.

More on Bart's work is contained in Norman's letter to James Marshall, donor of the Robert Marshall Fellowship, dated January 12, 1976, reporting on the work of the Marshall Fellows, and reproduced below.

Jon Strong worked with Burt Neuborne on two cases related to the Vietnam war. The first involved the rights of pickets at the U.N. Jon writes, "As I recall, the dispute was about how close the pickets could get to the entranceway or some other prominent location. I recall suggesting to Burt that he stress certain factual matters, as I felt that they could help color the legal issues more favorably. He rejected my suggestion, preferring to focus on the legal issues more abstractly. I don't recall the case's outcome.

"The second case involved a teacher from upstate New York whose school district had fired him because he had worn a black arm band protesting the war in Vietnam. The NYCLU had won the teacher's case before the Second Circuit, and the case was back in District Court on the amount of damages. While discharged, the teacher had worked as a summer school teacher and had also tutored or done some other work outside the regular school year/hours. The school district argued that what he had earned these ways should be set off against what it owed him. Burt Neuborne asked me to research the issues, and at first I found it difficult to find anything on point. Eventually, I found approximately 43 cases involving wrongfully discharged teachers. At about case 39, I found one involving a teacher who had taught summer school while he was discharged. In a paragraph which was not key-noted, the court ruled that the teacher's wages from teaching summer school should not be set off against what the school district otherwise owed him. The last case I read involved a wrongly discharged teacher who had done tutoring or other after hours work while discharged. Again, in a paragraph which was not key-noted, the court ruled the same way.

Jon also worked with Burt on a matter involving African-American farmers in Mississippi or Alabama who were losing their land at tax sales in extremely disproportionate numbers. "The theory was that the tax sale notice violated due process. I recall Burt disagreeing with a theory I put forward on that point. I don't think that the case moved much during that year. Indeed, it might never have been filed."

A leading outside event this year was a dinner in Washington, D.C., which was organized by Norman with Steve Gillers, a Field Fellow in the Hays Program 1967-1968, and now an NYU law professor, to commemorate the occasion of Justice William O. Douglas becoming the longest-serving justice in Supreme Court history (he remains the record-holder, having served more than 36 years). Every current and retired justice of the Supreme Court attended the dinner, except for Lewis Powell, who had a conflicting family commitment. Most of the Hays Fellows attended the dinner, which was a gala affair at the Mayflower Hotel.