

ARTHUR GARFIELD HAYS CIVIL LIBERTIES PROGRAM
ANNUAL REPORT

1972-1973 (Re-created)

The Hays Fellows this year were Joan E. Bertin, Peter Bienstock (Robert Marshall Fellow), Howard W. Goldstein, Charles M. Newman, Leroy C. Richie, Terry Rose Saunders and Elizabeth M. Schneider.

Joan Bertin worked at the NYCLU, primarily with Paul Chevigny, doing research on conscientious objector cases and on the Handschu litigation, a major First Amendment case in the Southern District of New York that was not resolved for many years, concerning the legality of government surveillance of protesters against the Vietnam War.

Joan also worked with Leon Friedman conducting research for *Disorder in the Court* (Pantheon Books, 1973), which Norman and Leon wrote. Joan also did research for Leonard Boudin on the Berrigan case, stemming from protests against the Vietnam War, and on ACLU briefs which alleged government misconduct in searching for evidence in the case.

Peter Bienstock wrote us, “Among my clearest memories are the Tuesday evening seminars with Norman and the other Fellows.”

Peter built upon his pre-Hays work at the NAACP LDF, with Bill Robinson and Mike Baller, where he litigated Title VII cases, including a class action on behalf of African-Americans denied employment as truck drivers. The case was filed against a trucking firm and a union and, among other things, addressed the burdens of proof in race discrimination cases. Peter later testified at the trial in Atlanta as an expert witness on the statistical compilations he had done as a law student.

Peter also assisted Paul Chevigny at the NYCLU on a number of matters, including a case involving a habeas petition for public school teacher James Horelick, convicted in the state courts of a crime different than the one for which he was indicted. Horelick's conviction resulted from incidents that occurred during the controversial and bitterly fought 1968 strike of New York City public school teachers. The strike, which divided teachers, involved issues of race and the decentralization of the school system. Among other things, Peter interviewed prisoners in the Manhattan Detention Center (the “Tombs”).

Peter worked with Ruth Bader Ginsburg and Brenda Fasteau at the ACLU Women's Rights Project on proposed New York City legislation prohibiting discrimination in private clubs.

Peter also assisted Norman and Leon Friedman on *Disorder in the Court*, published the next year. He writes, “I recall there is a very long footnote string-citing the statutes from all of the states on contempt for conduct in the courtroom. I can fairly claim that footnote. Talk about

changes in technology! I spent hours and hours on the first floor of the library, moving from Alabama, then across the entire floor, through Wyoming, pulling down volume after volume of the statute books, taking notes on index cards and re-writing or re-typing those notes into a coherent list for the footnote. (Are current Fellows fortunate or unfortunate that they don't have to go through the same disciplined exercise?)”

Howard Goldstein wrote us, “As to my recollections of my year as a Hays Fellow, more than 30 years ago now, my general recollection is how much I enjoyed the seminar and my participation on the ACLU Free Speech Committee. My specific recollection is about a brief I wrote in a case for the ACLU, which turned out to be the very first case I ever won, *Brunnenkant v. Laird*. We won summary judgment reinstating the security clearance of a German-born Defense Department engineer who had lost his clearance after criticizing the Vietnam War. In argument, the ACLU legal director, Mel Wulf, endorsed my motion in terms frequently used by the members of one of my current labor union clients.”

Charles Newman writes, “At the ACLU I worked with Ruth Bader Ginsburg on a brief. I’m not sure what the case was, but I recall that Ruth insisted that there be absolutely no shortcuts, and that every factual statement and legal argument had to be absolutely correct, no matter how small or well-known.” Charles also remembers “working at the NYCLU with Burt Neuborne, Paul Chevigny, Art Eisenberg and Norman Siegel (Burt had a ‘Spade and Archer’ stencil on his window).”

Chuck was assigned to the ACLU Communications Media Committee, on which he stayed until switching to the Free Speech/Association Committee. He remembers assisting Norman on updating a book and helping to canvas “the last-reported addresses of Attica inmates after the uprising.” He writes, “As I recall, we found no one who had any knowledge of the inmates, and most of the time the ‘address’ did not exist, or was vacant land or a parking lot. It was an interesting experience, but I’m not sure how helpful any of it turned out to be.”

Chuck also writes, “There was an interesting footnote to my having worked at the NYCLU. Several years later, my law firm represented a woman who lived in a commune on West Fourth Street. When our client decided to move out, she wanted to take her young son. But the boy had been told that the commune’s Earth Mother was his mother; his real mother had the role of his sister. When she told the elders she was leaving, commune members disappeared with the child. We learned that the adults who had the boy had been in touch with the NYCLU Children’s Rights Project, including by phone from Vermont. My law firm subpoenaed the NYCLU’s phone records to try to find the child, despite my caution that the NYCLU might (!) have strong views about its phone records being subpoenaed. As I recall, we settled the motion to quash by offering up me. The NYCLU agreed that instead of my firm getting copies of its phone bills, I’d be allowed to spend a few hours at the NYCLU office and call the Vermont numbers that appeared on their bill. It turned out to be a blind alley, but I was pleased to be trusted in a graceful way out of an impasse.”

Terry Rose Saunders worked under Bruce Ennis, then with the ACLU Mental Health Law Project, on *New York State Association for Retarded Children, Inc. v. Rockefeller*, 357

F.Supp. 752 (1973), (the Willowbrook case). This famous class action alleged that conditions and treatment of children and adults with mental retardation residing at the Willowbrook State School violated their civil rights. As the Court noted in its decision, “In spite of critical legislative reports dating from 1964, . . . [t]estimony. . . showed failure to protect the physical safety of children, and deterioration rather than improvement after they were placed in Willowbrook School. The loss of an eye, the breaking of teeth, the loss of part of an ear bitten off by another resident, and frequent bruises and scalp wounds were typical of the testimony. During eight months of 1972 there were over 1,300 reported incidents of injury, patient assaults, or patient fights.” 357 F.Supp. at 756.

The Willowbrook facility, located on Staten Island, New York, was eventually closed as a result of the litigation and negative media attention. Terry writes, “In particular, I can recall visiting Willowbrook with Bruce and James Clements, then the head of a facility for the mentally retarded in Georgia. I still have a vivid recollection of some of the horrible conditions I saw. Bruce was interested not only in correcting the inhumane conditions that existed at Willowbrook, but also in limiting involuntary commitment and establishing the principle that the residents of such institutions should be small, community based residences-- the theory of ‘the least restrictive alternative’ applied to mental health. . . .”

“While my role was quite limited, I did get a first hand appreciation of the role lawyers, professionals and courts play in institutional reform.”

Terry also drafted an ACLU amicus brief filed in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973). She writes, “I submitted the draft to then Professor Ruth Bader Ginsburg urging affirmance of a decision of the Pennsylvania Supreme courts that upheld a local ordinance that prohibited newspapers from publishing classified help-wanted ads in sex-designated columns” (such as Male Help Wanted and Female Help Wanted). The ACLU argued that want-ads in sex-designated column headings was ‘commercial speech’ that was not entitled to First Amendment protection. (This was before the mid-1970s cases holding that commercial speech merited heightened if not full First Amendment protection.) The Supreme Court affirmed 5-4, holding that the Commission’s order did not infringe the First Amendment rights of *Pittsburgh Press*. I remember several discussions with Professor Ginsburg before and after preparing my draft.”

Liz Schneider wrote, “I worked on a range of government misconduct litigation challenging warrantless government surveillance (*Dellinger v. Mitchell*, *Kinoy v. Mitchell*), challenging sex discrimination in television, (the *Petition to Deny the License Renewal of WABC-TV* on behalf of the NYC Chapter of the National Organization for Women, charging the station with sex discrimination in programming, employment and ascertainment of the problems, needs and interests of the viewing community), and work on rights of fathers to take child-care leave (*Danielsen v. Board of Higher Education*).

“I also was at the Center for Constitutional Rights (CCR), but the problem is that I had worked at CCR from my first summer in law school, through my second year, second summer and then my third year when I had the Hays. And then I went to CCR as a staff attorney right

after graduating after clerking for Judge Motley. So it has been hard for me to separate out what I did because it is all rather seamless (and sadly, memories fade).”