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REVIEW

*A journal of
legal theory
and practice
“to the end
that human
rights shall
be more
sacred than
property
interests.”*

—Preamble, NLG
Constitution



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editors' preface

In this issue we celebrate our organization's 75th anniversary with a series of biographical sketches of a sampling of the Guild's founders.

The group of attorney-activists that met in 1937 at the City Club in New York City was more diverse than any bar association in America. There were New Dealers, political radicals, desegregationists—men and women, black and white. They came together in common purpose—to form a progressive alternative to the stodgy, regressive, and racially segregated American Bar Association. This new bar association would defend the industrial unions of the CIO, promote Roosevelt's economic reforms and direct the legal zeitgeist against the metastasizing menace of fascism abroad and racism at home. It was an extraordinary moment and these were extraordinary individuals.

Our considerable satisfaction on publishing this commemorative 75th Anniversary Issue is tempered by our awareness of its shortcomings. The list of founders profiled here isn't just partial—it's fragmentary. The number of founders worthy of treatment would fill several issues. Any attempt to expiate our many sins of omission by naming some of those left out runs the risk of slighting others for a second time. We selected those herein included because they were deserving, but not necessarily the most deserving. The paucity of women and African-Americans probably reflects their representation within the Guild in 1937. Even if the organization welcomed their membership, the profession remained overwhelmingly white and male and its members were not free of the prejudices of the time. Indeed, only in the last forty years has

Continued inside the back cover

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Michael Krinsky

VICTOR RABINOWITZ

Victor Rabinowitz (1911-2007) served as the Guild's president at one of its most critical junctures, when a new generation surged into the Guild in 1967–70 and challenged both the authority and the wisdom of its elders, the stalwarts who had joined it as young lawyers at the organization's founding in 1937 and had kept it alive through the McCarthy period. Victor later ruefully remarked that he was not particularly trusted by the younger generation at that explosive moment, but was not as mistrusted as most of his contemporaries. Victor helped shepherd the organization through a transition that he prophetically saw as hopeful, if unavoidably chaotic. He continued to mentor and support the insurgent, younger generation—and several succeeding generations—for three more decades. Victor had the great satisfaction of being able to point out, more than once, that the Guild was one of the very few left-wing organizations born of the 1930s that had survived as a vital, progressive force.



Victor's radical roots ran exceptionally deep, and that perhaps helped him take the long view of things. His maternal grandfather, Jacob Netter, remembered by Victor as an old man with a beard (our image of Victor!), wrote for Yiddish anarchist newspapers in New York and had been an important member of the turn-of-the century anarchist circle that included Emma Goldman and Alexander Berkman. Victor's father, the secular issue of generations of rabbis, was drawn into Netter's anarchist circle, and married his daughter Rose in 1910.

Victor graduated from law school in 1934, and, in 1938, left a small firm with a traditional practice to work for Louis Boudin's labor law firm in New York. Boudin had been one of the founders of the Socialist Party in 1901 and was an important, prolific writer of both Marxist theory and American legal history. He is generally considered one of the founders of modern labor law and his scholarly work (including *Government by Judiciary*, published in

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1932), attacking the anti-labor, anti-progressive role of the courts, was deeply influential. At Boudin's firm, Victor worked with many of the left-wing CIO unions and found his path. In his memoir, *Unrepentant Leftist: A Lawyer's Memoir*, written almost 60 years later, Victor's exhilaration as a young lawyer is still palpable: "I was in heaven, The class struggle had come out of my books, onto the streets, and into my office."¹

Victor left Boudin's firm in 1944 to form his own labor firm. Leonard B. Boudin, Louis' nephew, left his uncle's firm and joined him in 1947. Their contributions together over the next four decades, until Leonard's death in 1989, are immeasurable. They were tireless and brilliant in their defense of progressive forces, from the darkest days of the McCarthy era to the civil rights movement, the anti-Vietnam War movement, and third-world resistance to U.S. imperialism, particularly the struggles of Cuba and Allende's Chile. Remarkably, their practice was almost entirely devoted to these efforts. Many of the cases they litigated—35 in the Supreme Court alone, and many times more than that in the lower federal courts—are seminal in constitutional law and international law.

When Victor left the Boudin firm in 1944, he stole a few labor clients, as did Leonard when he left a little later. Their firm soon gained additional clients among the N.Y. left-wing labor movement, and was growing, along with a strong union movement that went into the post-war era with great militancy. Victor worked closely with the American Communications Association (ACA) in particular. ACA's successful strike against Western Union in January 1946, soon after the labor peace imposed during WWII came to an end, crippled communications in the city for a time. Victor's work ran the gamut of federal board proceedings, behind-the-scenes mayoral intervention, and picket line arrests.

At the same time that he engaged in an active, left-wing labor practice, Victor devoted enormous time and energy to the American Labor Party, in what probably was the most hopeful period of his political life. Formed in 1936 as a third-party electoral alternative in New York, the ALP, much like the NLG, was initially an amalgam of New Deal forces (which wanted an opportunity for those disaffected with the Democratic Party to nonetheless vote for Roosevelt and other Democratic candidates on a third-party line) and more left-wing elements, including the Communist Party. Much like the NLG, the coalition soon split apart over anti-Communism, and Victor was in the thick of that bitter fight, both as lawyer and ALP activist. The left-wing emerged in control, and Victor became one of the ALP's leaders in Brooklyn, managing campaigns and running for various offices himself. The ALP was a vital force in NYC politics for more than a decade, promoting a political

program far to the left of what either major party offered and, most important to Victor, continuously discussing the issues with the electorate throughout the year, not just at election time.

In 1947, things began to change dramatically for Victor and his militant labor union clients, beginning with Congress' passage of the anti-union Taft-Hartley law. Section 9(h) provided that a union could not be certified as the representative of any employees for purposes of collective bargaining, nor could it file charges for violations of the National Labor Relations Act, unless each of its officers filed an affidavit that he or she was not a member of or affiliated with the Communist Party and did not believe in the overthrow of the government. Under the pressure of Section 9(h) and growing attacks from Congressional committees purportedly investigating communist influence, Victor's labor union clients were crippled or, in several important instances, jettisoned their left-wing lawyer as they moved to the right to escape the onslaught.

Victor led the challenge in the courts to Section 9(h) on behalf of ACA. In *American Communications Ass'n., C.I.O. v. Douds*,² the Supreme Court upheld the provision in a 1949 decision that opened the floodgates for more than a decade of repression. Justice Black, one of the dissenters in *Douds*, wrote in another dissent in 1961, in a case argued by Leonard, that "[for] at least 11 years, since the decision of this Court in *American Communications Assn. v. Douds*, the forces of destruction have been hard at work."³ Victor wrote that, when he argued *Douds* in the Supreme Court, the hostility in the courthouse was palpable.

Victor soon found himself representing his trade union clients in front of Congressional committees in what became known as the McCarthy era, although the witch-hunt preceded McCarthy's rise and continued after his fall. Victor's first client before the committees, in May 1951, was the president of ACA.

Over the next decade, Victor represented approximately 150 witnesses before Congressional committees, and Leonard another 75, together probably more than any other law firm save for Forer & Rein (Guild lawyers Joe Forer and David Rein) in Washington, D.C. Rabinowitz & Boudin's clients, initially trade union leaders, quickly came to include teachers, doctors, government employees, and a whole miscellany of persons in the radical community. A few were famous but most were not. Many were not able to pay any legal fees at all, and almost none could pay anything adequate. Victor and Leonard never turned down a client for lack of funds and considered themselves lucky if they could get their travel expenses covered for hearings outside of New York.

As he was representing the first of his clients to appear before the committees, Victor was served with a subpoena himself and was examined then and there about his own political and professional affiliations (including membership in the Guild). After a more than spirited colloquy with the committee's chair, Victor asserted the Fifth Amendment privilege against self-incrimination, as he did on subsequent occasions when he was subpoenaed by the committees. On one occasion, Senator Eastland, shouting "throw that scum out of here," had officers physically lift Victor out of the chair next to his client and put him in a separate room, where they stood guard over him until the session ended. A federal grand jury in New York summoned Victor in its investigation of a possible conspiracy of lawyers to have their clients refuse to testify before the committees. None of this, of course, deterred Victor or Leonard, or other Guild lawyers, in the least.

From the beginning, Victor tried to fight back in the courts, launching several elaborately conceived attacks on the various Congressional committees' jurisdiction and methods. Victor, together with Leonard, scored a few significant successes, including in the Supreme Court, but only on subsidiary points. For sixteen long years, from 1947 until 1963, Victor was to write, the "devastation wrought by the committees" on the country's politics and people's lives "was overwhelming," and "the courts were of no help whatsoever."

The witch-hunt involved loyalty hearings and dismissals from employment as well as congressional hearings, and was carried out on the state as well as the federal level. Victor's and Leonard's work included representation of numerous New York City school teachers and college professors who lost their jobs in these political purges, many of whose lives were crushed. Victor wrote with particular bitterness of the rank cruelty of these persecutions. In 1967, he began a proceeding for an award of back pay and restored pensions for those who had been fired in the 1950s and persisted until, in a different political time, New York City agreed to settle the claims fifteen years later in 1982. Victor found it far too late to exult with the city officials, who congratulated themselves for righting past wrongs at a City Hall ceremony.

I joined the firm in 1971, and, on innumerable occasions over the succeeding decades, witnessed the profound gratitude and affection felt for Victor and Leonard by an entire political generation, those who had suffered through the calamitous period of 1947–1961. They each had many triumphs in the years that followed, and much acclaim, but, for me at least, those dark times were Victor and Leonard's finest hour by far. As Victor always pointed out, there were other lawyers who also stood firm and true but, as Victor also noted, they were only a handful and almost all were in the Guild.

Victor joined the Communist Party in 1942, and left in 1960. He later explained that in 1942, “everything I saw around me confirmed my understanding of the principles of Marxism. Capitalism had resulted in successive periods of severe economic depression and two worldwide wars in my lifetime. Fascism was an imminent threat. A new order of things was called for, and the only credible alternative in sight was socialism.” Victor considered socialism a far-off goal in the United States, but there were many intermediate goals to fight for along the way. Neither the intermediate goals nor the long-range goal of socialism could “be accomplished without organization, and there weren’t many organizations available that looked to socialism as the ultimate goal.” Victor remained committed to socialism through his life, but by 1960, the Communist Party “no longer performed any useful function” as far as Victor could see, and he left.

Looking back, Victor wrote in his memoir that, for him, the CP principally served as the “connective tissue” that tied his different activities together—the ALP, the trade union movement, the NLG, his legal practice and even his social life. As a member of a lawyers’ group in the Party, he was concerned mostly with the legal problems facing the party itself, and organizational problems confronting the Guild, which were critical beginning in 1950 as the Cold War attack on the organization built. From Victor’s account, Guild members who were in the CP acted at most as a caucus of mutually supportive and like-minded individuals who strived to keep the organization alive in perilous times. They did not seek to subject the Guild to the party, whatever that might have meant.

For me, one of the most remarkable testaments to Victor’s political commitment is that, far from emerging exhausted and dispirited from the 1950s, he committed all his energy and passion simultaneously to the civil rights movement and the Cuban Revolution in the 1960s without missing a beat. In June 1960, the Cuban government retained Rabinowitz & Boudin to represent it and its agencies and enterprises in all legal matters related to the United States. Victor had traveled to Cuba in February 1960 to see what this revolution, which had ousted the dictator Batista only a month earlier, was all about. He was to write that on that visit and others to Cuba over the next few years, he saw “what a socialist government could bring to an underdeveloped semi-colonial society, and it was perhaps the most exhilarating experience of my life.” Victor and Leonard had represented many of the U.S. radicals and intellectuals who were advising or writing about the Cuban Revolution, and approached the Cuban leadership through them. The firm was finally retained over a chess game with Ché.

Within months of the firm being retained, the United States embargoed the sale of Cuban sugar to the United States—the lifeline of Cuba’s economy—and Cuba responded by nationalizing all major U.S. holdings in Cuba. U.S. business thoroughly dominated the Cuban economy, and the nationalizations, the most extensive since the Russian Revolution, consequently transformed Cuba entirely, and established the basis for its socialist, independent character.

Scores of the nationalized U.S. companies brought suit in the U.S., seizing whatever Cuban assets were available; the litigation was to dominate Victor’s professional work for the next twenty years. Tiny Rabinowitz & Boudin confronted the biggest and most powerful U.S. corporations, represented by the largest Wall Street firms, in multiple suits in their own country’s courts over a socialist government’s nationalization of U.S. property.

Victor wrote in his memoir that he wanted to represent Cuba because “this was an aspect of the struggle against international capitalism in which I hoped I could make some contribution.” As was often the case, Victor was right. The first wave of litigation culminated in the Supreme Court’s decision in the *Sabbatino* case,⁴ reversing the Second Circuit and upholding Victor’s argument that the courts of the United States should not sit in judgment of the legality under international law of Cuba’s nationalization of foreign-owned property within its borders. Rather, the Court ruled, such disputes are essentially political in nature, for the State Department to address and for the courts to avoid. The modern foundation for the “act of state” doctrine, the *Sabbatino* decision is one of the most important in international law.

Victor’s briefs in *Sabbatino* are a marvel, and it is simply thrilling to re-read them even after all these years. He succeeded in persuading the Supreme Court to recognize that the pronouncements of Western governments, courts and scholars on nationalizations did not make international law but were only the position of one side in the struggle—in the Court’s words, adopted from Victor—between “capital exporting” and “capital importing” countries. If it were to pass on the Cuban nationalizations, the Court agreed with Victor, the judiciary of the United States, the leading capital exporting country, would not so much be applying law but taking sides and, in any event, the courts would run the risk of embarrassing the State Department with decisions that might be at variance with the traditional U.S. diplomatic position. Victor’s argument to the Court combined great legal and historical scholarship, respectful but uncompromising presentation of the “third-world’s” position and a sophisticated analysis of the contradictions that might lead the judiciary to decide against U.S. business.

After two subsequent Supreme Court decisions on the Cuban nationalizations and several lower court decisions, U.S. courts did hold that they could

pass on Cuban nationalizations when presented in a particular, rarely found procedural posture. The result, the culmination of twenty years of constant litigation, was that the Second Circuit agreed with Victor that the United States' position on nationalizations, the "Hull Doctrine" of the 1930s, still espoused today by the State Department—that nationalization must be accompanied by prompt and full compensation—no longer represented international law, and perhaps never did.⁵

The nationalization litigation was just part of the firm's representation of Cuba, which continues today, more robust than ever. From advising on the U.S. embargo (better termed a "blockade" because of its extraterritorial sweep) to advancing Cuban interests in the limited commercial openings in the embargo that shifting U.S. policy permitted from time to time, protecting Cuban intellectual property, and much more, the firm's work for Cuba, under Victor's leadership, became all-encompassing. At the heart of it all, from the nationalization litigation to everything else, has been the firm's legal defense of Cuban sovereignty.

Victor led the firm's representation of Cuba for decades, with Leonard providing important assistance, particularly in the early days. At the same time, this remarkable partnership, with Leonard in the lead, challenged the U.S. ban on travel to Cuba, a critical element of the U.S. embargo, as part of the firm's civil liberties practice. In the 1950s, Leonard, one of the foremost constitutional and civil liberties lawyers of his time, had succeeded in having the Supreme Court strike down the Cold War denial of passports on political grounds and recognize travel abroad as a constitutional right. Leonard, with Victor's assistance, took the U.S. ban on travel to Cuba to the Supreme Court three times, and, the last time, came within one vote of success after winning in the court of appeals.

At the very same time that the firm began its representation of Cuba, it responded to the surging civil rights movement that began with the student lunch counter sit-ins of 1960. The northern supporters of the Student Non-Violent Coordinating Committee (SNCC), the most militant of the civil rights organizations, met in the firm's offices initially. Victor helped establish the Guild's relation with SNCC as the Guild launched its civil rights projects in the South. Victor travelled to the South to represent civil rights workers several times, and also to help protect the Guild-SNCC relationship from the intense anti-Communist pressure of powerful "liberal" elements in the civil rights movement and the federal government.

Most notable, perhaps, was Victor's work with the movement in Albany, Georgia, which saw the federal government indict nine SNCC civil rights workers for obstruction of justice, including Victor's daughter, Joni. All were

convicted and sentenced to jail. Victor, with Leonard's assistance, developed an elaborate challenge to the federal system for selecting grand and petit jurors in Georgia and much of the South as racially discriminatory. Predictably losing in the district court, Victor succeeded in having the federal jury selection system struck down by the Court of Appeals for the Fifth Circuit, sitting *en banc*.⁶ Not only were the convictions of the SNCC workers set aside, but many convictions in Texas, Louisiana and elsewhere were vacated.

As the civil rights movement in the South began to subside, the anti-Vietnam War movement came to dominate the firm's work, along with the firm's continuing work for Cuba. The firm soon developed substantial expertise in draft law and it counseled and represented hundreds of draft clients. Under the aegis of the National Emergency Civil Liberties Committee, for which Leonard served as general counsel, it brought taxpayer's lawsuits in multiple venues challenging the war as unconstitutional for lack of sufficient Congressional authorization.

Perhaps most importantly, Leonard and the firm took up three of the most notable anti-war criminal prosecutions: the defense of Dr. Benjamin Spock in the Boston conspiracy trial to counsel avoidance of the draft by issuing "A Call to Resist Illegitimate Authority"; Eqbal Ahmad, in the Harrisburg, Pennsylvania trial for conspiring (along with Philip Berrigan, Elizabeth McAlister and others) to kidnap Henry Kissinger and raid draft boards; and Daniel Ellsberg, for releasing the Pentagon Papers, the secret history of the Vietnam War commissioned by the Defense Department. Spock was convicted but his conviction was reversed on appeal.⁷ Ahmad's trial ended in a hung jury. On the eve of Ellsberg's case going to the jury, Leonard's repeated efforts to have the case dismissed for governmental misconduct emanating directly from the White House finally succeeded. Several of the charges in the Articles of Impeachment against Nixon concerned the Ellsberg case, one an attempt to prejudice the trial by covertly organizing a press attack on Leonard.

Throughout his long life, Victor considered the Guild to be of extraordinary importance, and essential to his own work. It was perhaps the organization dearest to his heart, and he took great pride in his role in helping the Guild survive and grow.

Victor believed, after all, that nothing of substance could be accomplished politically without organization. During the 1950s, occupied though he was with desperate litigation, Victor helped with the dreary administrative work needed by the New York chapter to stay alive. He served as president of the New York chapter in the early 1960s, as the organization gained a new footing and attracted new members, particularly on the strength of its courageous civil rights work. He took on the onerous responsibility of serving two terms

as national president of a divided Guild in order to seize upon the possibilities offered by the emergence of a new generation of radical lawyers and law students propelled by the anti-war movement, He remained as counsel and *eminence grise* after the transition of generations had been secured, helping guide and support the organization for still additional decades, into his 90s, as new opportunities for growth emerged and new dangers threatened.

There is much more to Victor's legal and political work over a very long life than can be even suggested here, and, indeed, much more than Victor was able to detail in the 300-plus pages of his memoir. To me, however, it is not the particulars, but just how serious was his effort that is most remarkable and instructive. When I joined the firm in 1971, at the age of 26, it took me a while to get it, but I eventually figured it out that Victor conceived of his job as having three parts. One was the representation of clients—mostly clients he approved of politically, none that he thought were really on the wrong side of the fence. Another part of his job was taking care of the Left, even apart from representation—the Old Left, the New Left, what aspired to be the Left, what Victor hoped someday might become the Left. Endless phone calls, endless visitors to the office, so many people wanting his help, his legal and political advice—and everyone getting his attention. And the third part of his job, as he saw it, was training and mentoring us—the next generation—the young lawyers in the office, and, just as important to Victor, young lawyers out of the office—particularly, of course, in the Guild.

In each of these three ways, Victor was a model and an inspiration for all of us, Victor thought that it was his job to do it all—and he steadfastly carried on with it for 60 years or so,

NOTES

1. All of Victor's quotes are excerpted from VICTOR RABINOWITZ, UNREPENTANT LEFTIST: A LAWYERS'S MEMOIR (1996).
2. 339 U.S. 382 (1950).
3. *Braden v. United States*, 365 U.S. 431, 444 (1961) (Black, J., dissenting, joined by Warren, C.J. and Douglas, J.),
4. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).
5. *See Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 U.S. 875 (2d Cir. 1981).
6. *Rabinowitz v. United States*, 366 U.S. 34 (5th Cir. 1966).
7. *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969).



Ann Schneider

FERDINAND PECORA PUT “CAPITALISM ON TRIAL FOR ITS LIFE”¹

At the February 1937 founding conference of the new National Lawyers Guild, the Saturday night banquet was headlined by Ferdinand Pecora, who as chief counsel to the Senate Banking and Currency Committee, ferreted out responsibility for the 1929 financial crash and called on the carpet Wall Street’s top financiers. Ultimately this led to the creation of the Security and Exchange Commission (SEC) and the erection of a wall between commercial banks and investment banks, enshrined in the 1933 Glass-Steagall Act. Pecora’s remarks that night, along with those of journalist Heywood Broun, Carol King and Morris Ernst, were broadcast over a national radio network.



Ferdinand Pecora (1882-1971) emigrated from Sicily at age four and entered the historical stage (left) with a political ambition inspired when he was fourteen by hearing William Jennings Bryan speak. He joined the Progressive Party and aligned with Tammany Hall, following the lead of his mentors, Al Smith and Robert Wagner. As a reward for his successful campaigning, he was appointed as an Assistant District Attorney in 1918 where he prosecuted fly-by-night stockbrokers who sold fraudulent securities. He refused to prosecute murder cases because he was opposed to the death penalty. He obtained a new trial for a young black man framed for a robbery by a detective who demanded a bribe to let him go. After hearing of this allegation, Pecora re-interviewed the complaining witness, saying “You look like the type of woman who wouldn’t want to see anyone sentenced unjustly. Please think this over very carefully. . . and let me know if the testimony you gave on the stand was the truth.” It was not.

St. John’s University Law Professor Michael Perino’s book *The Hellhound of Wall Street*,² tells the tale of the riveting first ten days of the 1933 hearings

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beginning just before FDR's March 4th inauguration, when unemployment was 25 percent and 38 states had closed their banks. Food was rotting on the trains while cash to buy food was scarce, leading to deaths in Detroit and elsewhere from starvation. The effect of the Pecora hearings was to mobilize a groundswell of support for major banking reform and to make its adoption inevitable. Whereas the *New York Times* editors had gone on record opposing regulation based on a few "monstrous exceptions," by the end of the hearings, they said the banks had "failed a test of their pride and prestige." Other newspapers said bankers needed to be put into a "legal straitjacket."

Walter Lippman was one who had felt the hearings only served to undermine confidence and exacerbate the banking crisis. He afterwards opined that "the exposure has proved to be a good thing," in that it "opened the way for a more thorough-going reconstruction." Banks began to voluntarily disaffiliate from their wholly-owned securities firms. FDR refused pleas to rescue the banks, complaining that business was at a standstill. Instead, he retorted that they "should have thought of that when they did the things that are now being exposed."³

Perino shows how Pecora's mastery of facts, prodigious memory and dogged cross-examination changed the national climate to favor reform, especially as compared to earlier hearings, whose reports were literally buried.⁴

Virginia Senator Carter Glass had for years been trying to win legislation separating basic deposit-and-withdrawal ("commercial") banking from investment banking, but got nowhere—failing to survive a filibuster by Louisiana demagogue Huey Long. This was just months before Pecora was hired by progressive South Dakota Republican Peter Norbeck to serve as Chief Counsel to the Banking and Currency Committee's ongoing investigation of the problems of short-selling and sale of securities by proprietary institutions.

Norbeck was prompted in part by a letter from San Francisco widow Helen Kirst, who lost her life savings, after she was convinced by the bank's sales force to turn in her government bonds for shares of City Bank. She wrote to the head of National City Bank, Charles Mitchell, who wrote back that he was sorry, but she "shouldn't have gambled." She, in turn, sent the correspondence on to Senator Norbeck.

The author shows how Pecora followed the playbook of Louis Brandeis's *Other People's Money and How the Bankers Use It*⁵ and how Pecora's chutzpah led him to subpoena National City Bank's Charles Mitchell as his first witness, in part to forestall him from leaving the country for a planned vacation in Europe.

Mitchell was hauled into Congress to explain how he had come to be known as "the greatest bond salesman who ever lived." National City Bank

(now Citigroup) aimed to be a financial supermarket and set out to expand the number of its shareholders from 15,000 in 1927 to 86,000 in 1933. Its securities affiliate, National City Company, had 350 salesmen who were told by Mitchell, "There are six million [middle-class] people with incomes that aggregate thousands of millions of dollars." Besides advertising in magazines, salesmen culled automobile registrations to troll for small-time investors and approached depositors with City Bank to buy stock. Potential buyers were told to look to "National City's judgment as to which bonds are best for you." Sales of bonds were running at \$1.4 million per year.

Pecora made Mitchell explain the compensation system at the two supposedly separate institutions and elicited an admission that the management fund, which included a bonus pool, was shared between City Bank and the National City Company. Mitchell kept the salaries low so as to provide incentive to his staff to earn bonuses from greater sales. Pecora showed that shareholders were kept in the dark about how the salesmen made their money. To Pecora, this was "a gigantic foolproof device for gambling freely with the stockholders' money, taking huge profits when the gamble won and risking not a penny of their own money if they lost."

Mitchell explained to the committee that City Bank was not violating the law against buying and selling its own shares; rather it was the National City Company which was trading in City Bank stock. But he had to concede that he was the chairman of both entities.

One major revelation occurred when Pecora elicited testimony that Mitchell wrote down the value of its \$25 million investment in Cuban sugar (from \$200 per share to \$1 per share) after major losses, transferring the shares from City Bank to its securities affiliate. Mitchell characterized this transaction as "a transfer at the time of a short-term questionable investment that the bank had . . . into a long-term investment in the City Company." The bank's shareholders were merely repairing "the condition of the institution," Mitchell testified.

Senator Norbeck questioned Gordon Rentschler, the president of City Bank. Norbeck brought out evidence that two weeks after the 1929 stock market crash, the bank's board authorized lending the company's top one hundred executives up to \$2.4 million in interest-free loans. This contrasted sharply with an employee stock purchase plan available to lower level employees, in which they paid top dollar for shares that later fell to barely 10 percent of the purchase price. Worse, the purchase money was withheld from their pay, making them indentured to their jobs at a time of 25 percent unemployment. They couldn't quit, but on at least one occasion, an employee was discharged shortly after his stock purchase was paid off. Meanwhile, the large outstand-

ing balance of the loans to the executives was once again simply transferred to the ledgers of the National City Company.

Questions put to the National City Company's treasurer and to the head of the municipal bond department showed that, shortly after it handled a \$66 million bond offering for the Port Authority, the sum of \$10,200 of the stockholders' money was drawn out in cash and given as an unsecured "morale loan" to John Ramsey, the Port Authority's general manager.

Retained by Roosevelt after his inauguration, Pecora called J. P. Morgan, Jr. to the stand and revealed, *inter alia*, that J. P. Morgan had a preferred list of clients to whom he sold stocks for below market prices, including Owen Roberts, a Supreme Court justice, and Charles Lindbergh, whose father, while in Congress, called for an investigation on "the money trust." According to Pecora's memoirs, an unidentified but "important financial figure" offered Pecora one million dollars not to put him on the stand.⁶

Charles Mitchell was later indicted for tax evasion but his lawyer, Max Steuer (who had previously won the acquittal of Harris and Blanck, the owners of the Triangle Shirtwaist Company), argued it was mere tax avoidance, not evasion.

Mitchell confessed in the hearings that City Bank didn't just sell securities, it "manufactured" them. Unfortunately, the practices Pecora so handily exposed have returned to haunt us, thanks to Robert Rubin and his deputy, Larry Summers, who pushed for the 1999 repeal of the Glass-Steagall Act.⁷ Just as an example, two former J.P. Morgan brokers acknowledged last month that they pushed proprietary stock known as "Chase Strategic Portfolio" on the basis of inflated returns, which charged annual fees 50 percent higher than competing products, a handsomely profitable scheme ultimately approved by Jamie Dimon.

Pecora's time with the Guild was short-lived. By 1939, the Dies Committee had already accused the Guild of association with the Communist Party. To avoid the possibility that well-positioned liberals like ACLU General Counsel Morris Ernst, Judge Ferdinand Pecora (elevated to the New York bench in 1935) and Solicitor General Robert Jackson might resign, the body adopted a platform of opposition to all ideologies, communism, fascism, nazism, "any 'ism' that would challenge our democratic institutions." Pecora, elected President of the NLG in 1938, left anyway after the 1939 convention. Interestingly, known CP members supported this position, while non-Communists opposed it as a "purge." When the *New York Times* announced a split in the Guild, our newly-elected national president, 31-year old Paul Kern, replied in effect, "So what?," citing the fact that one in every 25 New York City voters is a Communist.

Pecora himself had no association with socialists or Communists. He said in an oral history with Columbia University, “I always felt that if the evils of capitalism could be excised from our economic system that the principle of capitalism is sounder than that of state ownership of the means of production.”

Following his leadership of the 1933 hearings, Pecora was appointed as one of six Commissioners on the newly-created Security Exchange Commission (SEC), where he served under Joseph P. Kennedy, along with Guild founder Jerome Frank.

Pecora’s book, *Wall Street Under Oath*, is now only available in libraries or in piracy collector’s editions.

Consistent with his time as a conscientious DA, Pecora’s last public battle was in 1966, when he and other judges, lawyers and congressmen vowed to fight the NY City Bar Association’s referendum to kill the Civilian Complaint Review Board. By then, he had long since left the Guild. Many legal luminaries left over the years, whether because they were unwilling to stand strong in the face of red-baiting and other attacks on the organization, or because they truly disagreed with its political stands. We should forget neither their abandonment of the Guild—and the strength of character of those who remained—nor the contributions they made.

NOTES

1. The title quote is excerpted from a lecture given in 1938 at the Pacific School of Religion, Berkeley, California on capitalism by Henry A. Wallace.
2. MICHAEL PERINO, *THE HELLHOUND OF WALL STREET: HOW FERDINAND PECORA’S INVESTIGATION OF THE GREAT CRASH FOREVER CHANGED AMERICAN FINANCE*. (2010).
3. Ron Chernow, Op Ed, *Where is Our Ferdinand Pecora?*, N.Y. TIMES, Jan 6, 2009.
4. LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* (1914).
5. Solicitor General Frederick Lehmann’s 1911 opinion finding that “National City Co. ... is in usurpation of federal authority and in violation of federal law,” was deleted from the Department of Justice’s files on President Taft’s watch.
5. FERDINAND PECORA, *WALL STREET UNDER OATH: THE STORY OF OUR MODERN MONEY CHANGERS* (1939).
7. SIMON JOHNSON AND JAMES KWAK, *THIRTEEN BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN* (2010).



Michael Ray

BARNEY ROSENSTEIN—LAST LIVING FOUNDER OF THE NLG

Barney Rosenstein, the last known founding member of the National Lawyers Guild, died on my birthday, August 23, 2009. He was 100 years old. He was my mentor and really good friend.



In 1937 Barney celebrated his honeymoon in Washington, D.C. helping to found the National Lawyers Guild. He and his wife of almost 60 years, Fanchon, were inseparable. They would come to Guild Conventions together. That is where I first met them 20 some years ago. Barney used to joke that if he had known he was going to live so long, he would have taken better care of himself. That was Barney--always cheerful, helpful, upbeat and positive.

Barney was born in the Bronx, New York on December 10, 1908 to Samuel and Anna Rosenstein, Latvian immigrants, who immigrated to America, speaking only Yiddish when they arrived. Barney had four sisters. He lived with his family in a five room apartment. His father worked as a painting contractor and his mother, Anna, was a homemaker.

Barney's family survived the Spanish Flu outbreak of 1918. The only person who would visit the family while they were ill was the local saloon-keeper, who was the closest thing in those days to a social worker of today.

Barney graduated from St. John's Law School in New York, in 1930, during the height of the Great Depression. He almost did not graduate because he did not have the money to pay tuition to finish law school. Fortunately, he received a tuition waiver. He used to say, "I don't know what was so great about it."

Barney's early legal work helped to support unions and residential tenants. In the 1950s, he organized and represented tenant associations in New York City fighting for fair housing and rents. He fought for the rights of tenants to picket and to complain about poor housing conditions. He was the New York City Rent and Durable Goods Secretary in 1946. I spoke with a long-time Guild member, Ralph Shapiro, who knew Barney from the time they worked

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together on a housing project in New York City in the late 1950s. Ralph was the attorney for the Foreign Leather Machine Workers Joint Board Union. Barney was the go-to person, successfully advocating for the Board and doing whatever was necessary to implement the construction of the Sam Burt Project—a low-cost housing project in Coney Island.

In 1959 Barney helped lead the efforts to save Carnegie Hall from the wrecking ball. He organized tenants and artists who lived in the Carnegie Hall complex to successfully call on Mayor, Robert F. Wagner and Governor Nelson Rockefeller to preserve Carnegie Hall.

In 1975 Barney retired with Fanchon to Sarasota, Florida. He practiced law (without being paid) and remained politically active up to the time of his death. Through his 80s and 90s Barney devoted many pro bono hours to Legal Services, working to keep tenants facing evictions in their homes. Barney would go to the Sarasota Salvation Army to give legal advice to women living there, helping them to receive disability benefits. He helped Haitian immigrants apply for permanent residence under the Haitian Refugee Immigration Fairness Act. He wrote articles and lectured on the Bill of Rights for the Public library. He also volunteered at the Jewish Family and Children Service of Sarasota-Manatee County. Barney did other volunteer work for Hospitality House, Project to Assist the Tenants at Janie Poe Public Housing and Gulfcoast Legal Services. In his spare time he worked with the local Democratic Party and helped to create Mental Health Courts.

Barney was able to save James Douglas Hill, a mentally retarded man, from Death Row, in a case he took to the United States Supreme Court. Just like all of Barney's Florida legal work, this was done pro bono. In fact, it cost him money. He lost sleep over the case and paid psychiatrists and other experts from his own pocket in order to develop the record needed to save his client's life. Barney was a strong advocate for abolition of the Death Penalty.

I became good friends with Barney. We would talk to each other on the phone from time to time. I would drive up to visit him sometimes, for his family reunions, his birthdays, when his Temple honored him. About 7 or 8 years ago he invited me to come up to speak to a group of elderly folks at the Manatee County Public Library in Sarasota, about representing Haitian refugees. When I got to the Library I was amazed to find about 50 people waiting to hear the presentation. They were outraged to hear how our government treated Haitians and they had many good questions and comments.

Barney spent a great deal of time doing volunteer work with Gulf Coast Legal Services in Sarasota. He worked with Elizabeth Boyle, Esq., whom I met at his 100th birthday party. If you Google "Barney Rosenstein" you will find videos of him trying to recruit money and assistance for that organization.

In one video he even does rap. Elizabeth Boyle watched President Obama's inauguration on television with Barney, shortly after Barney's 100th birthday. She remembers how Barney was in awe over that historic moment, and how he stated that he never thought he would live to see the day an African American was elected President. Barney died nine months later.

Barney was instrumental in the successful effort of the Southern Region of the Guild to change the voting system of our members to the present method by which each person's vote counts equally, and everyone can vote, regardless of whether he or she attends annual NLG conventions. He was very happy to see this reform in the organization that he helped give birth to.

Barney swam nearly every day almost up to his final days. A while after his wife died, he moved in with a younger girlfriend. When she died, he moved in with a new girlfriend who was even younger than the previous one. He never stopped dating. Sometimes he would say he was frustrated with the women in his assisted living facility because all they would talk about was their doctors, their medicines and their aches and pains. I never heard him complain about anything.

When asked what his secret of success was Barney said: "Always being optimistic. I don't deal with the past, each of us have pasts. I don't spend energy on the past. The only permanent thing in life is change. Adapt to change or you are really in difficulty."

In 2006 the Mary Brogan Museum of Art and Science in Tallahassee, Florida created a photo/audio exhibit called "Wisdom of the Ages," showcasing the experiences of 30 outstanding senior citizens living in Florida. Barney Rosenstein was one of the featured subjects who relayed their life experiences. In the taped interview, Barney stated: "In other countries and societies, we look to the older person for wisdom. The older person has acquired experience. We need to make sure not to parcel the older person off to a retirement home. Just because their hair may be gray, doesn't mean they've lost their knowledge."

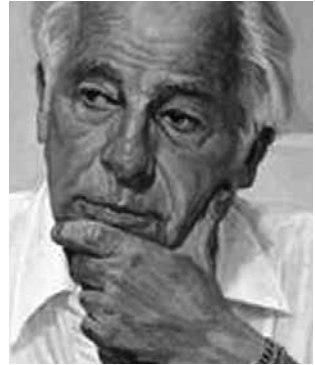
For Barney's 100th birthday the National Lawyers Guild, at its 71st Annual Convention, passed a resolution honoring him, "commemorating, honoring and thanking Barney Rosenstein for his contributions to the National Lawyers Guild, to the legal community and to society, and for providing younger Guild members a shining example of a life-long spirit of action in the best traditions of our profession." Thank you, Barney. We miss you!



Nathan Goetting

THOMAS I. EMERSON: BRAVE DURING THE SCARE

There's no shortage nowadays of sober-minded lawyers and law professors, steeped in the culture and values of their increasingly cynical and self-centered profession, who scoff at idealistic law students who seek to build a career that will change the world for the better. Even worse, many of them try to be helpful by disabusing these young people of the progressive goals that brought them to law school in the first place. Whenever these idealists are inclined to lose hope, they should look to the career of Thomas Irwin Emerson.



Courtesy of Yale Law School

Many books should already have been written about his life and work. And unlike the biographies of most lawyers and academics, his life was an adventure story—a series of adventure stories would probably be more accurate. The more one learns about his long and eventful legal career, from its very start to its very finish, the more impressed one becomes with the bold and powerful role he played in the great legal and political controversies of his day. He worked and fought at the forefront of one reform movement after another. But just as impressive as his many great victories in the courtroom and enduring scholarly works is the personal courage he displayed throughout. Emerson was a left-wing lawyer and academic, at the very top of both fields, during a time when both the bar and the academy were being ruthlessly and systematically (and sometimes unconstitutionally) purged of those who felt and believed as he did. Instead of cowering and conforming, as countless others chose to do, he risked everything he had by becoming the public face of the one bar association in America determined to fight back on all fronts. When the U.S. government chose the National Lawyers Guild for extinction and its members were faced with potential stigma, disbarment, or worse, Emerson, a Yale professor with an exciting career ahead of him, put his neck out farther than most despite having a great deal more than most to lose. This is one of the defining features of his career,

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both within the Guild and apart from it—his determination to parley his many privileges as a white, male, Yale-educated law professor into a force on behalf of the rights of those belonging to groups denied such privileges. He was a fighting desegregationist, feminist, and civil libertarian, in the courtroom, in the classroom, and on the printed page during times when being any one of these was controversial, sometimes exposing himself to grave risks.

Emerson graduated first in his class from the Yale Law School where he was editor-in-chief of the *Yale Law Journal*.¹ He had always been attracted to the idea that lawyers should use their skill and training not just to push for justice within the legal system but to transform the system itself into something more just. After graduation, he declined offers from top Wall Street firms² to work under the mentorship of renowned ACLU attorney Walter Pollack at the firm of Englehard, Pollack, Pitcher and Stern in New York. Pollack had made a name for himself by working with ACLU colleagues on behalf of radical political dissidents. Two dissidents whose cases Pollack and colleagues took to the Supreme Court were Communist Labor Party members Benjamin Gitlow, represented at trial by Clarence Darrow, and Anita Whitney. Both cases resulted in First Amendment opinions now anthologized in virtually every constitutional law casebook. As one might imagine, the two years Emerson spent working for Pollack in the early 1930s profoundly affected the young attorney's views and values. Fresh out of school, he found himself working on some of the nation's most controversial and highly publicized constitutional cases, including *Powell v. Alabama*,³ about which the whole world was talking. This was one of the sensational "Scottsboro Boys" cases, which began with two white women who claimed, falsely as it turned out, to have been gang raped by nine African-American men and juveniles in the heart of the old Confederacy. The firm's indigent clients had been railroaded and summarily sentenced to death after a sham trial in which they had no meaningful legal counsel. Still in his mid-twenties, Emerson assisted in an effort that would eventually convince the Supreme Court that a criminal defendant facing the death penalty was entitled to court-appointed, state-funded counsel, laying the groundwork for the landmark *Gideon v. Wainwright*⁴ in 1963, in which these rights were extended to all felony defendants.

As the effects of the Great Depression worsened, Emerson's thoughts drifted somewhat from the defining cause of his life—democratizing the application and understanding of civil liberties—toward using his considerable legal talents to help remedy the immediate crisis of America's failing capitalist system.⁵ With the aid of a letter of recommendation from Felix Frankfurter, a Harvard professor who had gotten to know Emerson during a semester's visit at Yale,⁶ he moved to Washington, D.C. as part of a wave of idealistic attorneys seeking to implement Roosevelt's economic reform agenda.

Over the next twelve years Emerson became the quintessential New Deal attorney, working superhuman hours amid the creative chaos of several different federal agencies, including the National Recovery Administration, the National Labor Relations Board, the Office of Price Administration, the Office of Economic Stabilization, and the Office of War Mobilization and Reconversion. Emerson would always retain a fondness for these days, and would remain devoted to Roosevelt in a way that was grounded in reason, but heartfelt and genuine. A few years after he left Washington, when he was president of the Guild and the House Un-American Activities Committee (HUAC) and others were at the height of their dementia and malignancy, Emerson would insist that Roosevelt “would not have tolerated such foolishness or such cowardice.”⁷

Emerson was among those early Guild members who sought to challenge the reactionary ideology of the prevailing legal establishment that was blocking Roosevelt’s New Deal. He brought youthful energy, strong leadership, and one of the greatest legal minds of his generation with him when he decided to serve on the Guild’s original National Executive Board (“NEB”) and as the first Chair of the Washington, D.C. Chapter. During the Guild’s great internecine battle of 1939–41 between the more conservative New Dealers, many of whom actively supported J. Edgar Hoover’s ongoing attacks on political dissenters, and the more radical members, there was a mass exodus of high-profile Roosevelt administration lawyers, many of whom had been leaders within the Guild. The more conservative faction was led by Guild co-founder and ACLU leader Morris Ernst, who we now know was a longtime FBI informant.⁸ The two sides argued over a number of issues. Foremost among them were the Guild’s position regarding America’s neutrality toward the Spanish Civil War, the recently signed Molotov-Ribbentrop Pact between the Soviet Union and Nazi Germany, and the extent to which the Guild would tolerate Communists within its ranks. Ernst would successfully purge the ACLU of radicals but failed to do the same with the Guild—and therefore left. With him went such notables as Wall Street nemesis and former Guild President Ferdinand Pecora and future Supreme Court Justices Robert Jackson and Abe Fortas, along with countless others. But not Emerson. Throughout the terrible world war that would soon follow, he remained loyal to the Guild, the New Deal, and America’s belated entry into the fight against fascism.

It was the Guild’s great good fortune that during the worst of times it had the best of leaders. Emerson was elected president of the Guild in May 1950 and the 18 months he spent in office battling the predations of a manic federal government, especially the FBI and HUAC, would help to keep the Guild from being destroyed. Looking back, the dark time of Emerson’s presidency may actually have been the Guild’s finest hour.

In an attempt to get the Guild officially listed by the attorney general as a subversive organization, on September 17, 1950 HUAC published a report titled, “The National Lawyers Guild: Legal Bulwark of the Communist Party.” The report sought to prove that the Guild was “an agent of a foreign principal hostile to the interests of the United States...[and] in line with the current line of the Soviet Union.”⁹ The report was a microcosm of the second red scare—paranoid, belligerent, reactionary, short on facts, long on innuendo, and indifferent, if not downright hostile, to the rights of the accused. Offering virtually no direct evidence that the Guild was anything other than what it claimed to be—independent of all political parties—its primary methods of persuasion were guilt by association, mistaking coincidence for causation, and omission of even the most conspicuous facts if they were inconvenient to the report’s pre-determined conclusion. The entire document still reeks with fear.

Throughout the report, HUAC confused the Guild’s opposition to the government’s anti-communism tactics—and the temerity the Guild showed by affording the Sixth Amendment right to counsel to actual Communists—with membership in a Stalinist conspiracy. The report listed individual Communists the Guild had defended, explaining that “it is standard Communist practice to accept as attorneys only those who agree to abide by the party’s propaganda and conspirative directives.”¹⁰ The report went on to recite a long parade of other horrors that, considering the absence of any persuasive evidence, could only have been considered horrible to the kind of person predisposed to regard them as such. Its main allegations were that the Guild: (1) sought to bring the judicial system into disrepute through such devious tricks as politicizing trials and “substituting insult for argument;”¹¹ (2) opposed the government’s loyalty program, opposed anti-Communist legislation and legislative committee investigations; (3) took official positions mirroring the Communist Party line; and (4) had within it a number of Communist Party members—all of which bore certain elements of truth but hardly prove that the Guild was under Moscow’s control.

The Guild had chosen to stand athwart every dimension of the government’s anti-Communist agenda and refused to take on the role of inquisitor against its own members as many other activist groups, like the ACLU, had felt compelled to do. HUAC had accused the Guild of being Stalinist, but it was HUAC itself, through the publication of this very report, that was in the process of mastering Stalinism’s defining attribute—the ideological purge. Loyalty to the core freedoms of our Constitution, especially those of the First Amendment, meant opposition to any government’s loyalty program. Sniffing around one’s own membership lists to preserve the current political orthodoxy was not a game Emerson and the Guild were willing to play.

It would not have been a HUAC report if it didn't invite social and financial punishment (and provide suggestions to law enforcement) by naming names. In the section of the report titled "Guild Communists and Fellow Travelers,"¹² not far from the top, is a paragraph on the Guild President. HUAC leaves us wondering whether Emerson is a bona fide Communist or merely a "fellow traveler." They could rest assured, though, that "Mr. Emerson has an unusual affinity for Communist-front organizations."¹³

Emerson knew the Guild needed to respond quickly and thoroughly. He authored two responses, both published in *Lawyers Guild Review*.¹⁴ "Answer to the Report of the House Committee on Un-American Activities on the National Lawyers Guild"¹⁵ was a short piece written as an immediate retort. The second answer, a devastating point-by-point counterattack titled "National Lawyers Guild: Legal Bulwark for Democracy,"¹⁶ was published shortly thereafter, but not before the FBI had stolen a draft Emerson had been keeping in his office at the Yale Law School.¹⁷

To Guild members who haven't yet explored the organization's history, I especially recommend reading this document. In his first "Answer to the Report" Emerson announced that "Guild members will not be intimidated."¹⁸ In "Legal Bulwark for Democracy" he made good on that promise.¹⁹ Reflecting on the stinging impertinence of Emerson's words, which point the finger back at HUAC with such force, eloquence, fearlessness, and candor, it would be difficult for contemporary Guild members to prevent a welling up of pride at *this* particular accomplishment.

Emerson didn't merely defend the Guild. He prosecuted HUAC. It was obvious that the specific evidence proffered by the report, such as it was, had to be challenged tit-for-tat, item-by-item—and he did so. But what was most impressive about Emerson's response wasn't his defense of the Guild but the offensive he launched against the bully trying to shut it down. He didn't merely argue that the Guild wasn't under Communist control. He turned the tables on HUAC by exposing it as America's worst perpetrator of crimes against freedom and democracy. On the first page of "Bulwark for Democracy," Emerson announced that the authoritarian organization being exposed by HUAC's report is HUAC itself rather than the Guild and that, after the hysteria and witch-hunting finally abate, and a more rational perspective begins to prevail, future generations will see HUAC for what it truly is. "[T]he report of the Committee is an indictment, not of the Guild, but of the Committee itself...[T]he Committee has functioned as the chief instrument for undermining the whole democratic process in the United States... History will record that the Committee on Un-American Activities, more than any other group or force in the United States, has twisted and corrupted the time-honored methods of democracy."²⁰

To the charge that Guild lawyers follow the Communist line by trying to discredit the U.S. judicial system, Emerson noted that the report only cited two cases involving seven Guild attorneys, ignoring the thousands of other cases tried by the “90-odd officers of the Guild.”²¹ The report had neglected altogether the “number of distinguished judges” who are Guild members.²²

While the report correctly had stated that the Guild opposes the government’s loyalty program, Emerson demonstrated that it fails to explain the bases for this opposition, which had nothing to do with promoting Moscow’s interests but were rooted instead in a legitimate concern that the program violated core constitutional rights. He pointed out, for instance, that the report failed to mention that the Supreme Court had agreed to hear cases on these questions, “establishing conclusively” the legitimacy of the Guild’s concerns.²³ It was also concern for constitutional rights, particularly those of the First Amendment, that formed the Guild’s opposition to legislative committees, like HUAC, investigating subversive activities.²⁴

Emerson cited a number of specific examples, not included in the HUAC report, where the Guild “has taken a position diametrically opposed to the Communist position.”²⁵ One was a 1939 resolution of the NEB declaring a “general agreement” with a speech given two days before by then-President Ferdinand Pecora, during which he announced, “[W]e are pledged to the protection of our democratic institutions. That means that we oppose any and all ideologies or political philosophies which challenge them, whether from the right or from the left. Communism, Fascism, Nazism, any Ism, be it of native or alien origin.”²⁶ Another was a 1939 NEB resolution condemning the Soviet invasion of Finland.²⁷ Emerson didn’t dispute the report’s claim that some Communist Party members are also members of the Guild. Instead he makes clear that, as a democratic bar association, it should allow “for the expression of all viewpoints” and that “The Guild does not and will not investigate or inquire into the political beliefs, activities or associations of its members. Such matters are the private affair of each member.”²⁸

HUAC’s report damaged the Guild’s popular reputation for years. In their magisterial anthology of Guild writings, Ann Fagan Ginger and Eugene M. Tobin write that “For years after the release of the HUAC report millions of people must have assumed the Guild’s full name was ‘National Lawyers Guild: Legal Bulwark of the Communist Party.’”²⁹ Membership declined dramatically. An organization that had been 4,000 lawyers strong when founded in 1937 was reduced to 500 in 1955,³⁰ and the Guild had to struggle for the next several years to survive.

But Emerson’s words have been proven prophetic. History has exposed HUAC for what it was. Beyond a few unhinged neo-fascist revisionists like

Ann Coulter,³¹ there's now a virtual consensus that Emerson's portrayal of HUAC was dead-on. "McCarthyism" is an epithet now used by mainstream politicians of both major political parties. Likewise, we can now more clearly see just what kind of leader Emerson was by choosing to challenge HUAC the way he did—never backing away or temporizing, continually vindicating the Guild's core values, boldly asserting that everyone, even Communists, were entitled to a zealous defense under the Constitution. Always calling things by their right names.

Throughout the numerous writings and speeches he made during this period, shoring up strength and energy in Guild chapters around the country, he never wavered from his practice of italicizing the value of the Guild by exposing the dangers of the government's unscrupulous attack on free thought and civil liberties. To speak Emersonianly of HUAC now is, in most circles, simply to express common knowledge. To do so in 1950–51—after China had just "fallen" to the Communists and the Soviet Union had just exploded its first atom bomb, with the Korean War and the Rosenberg trial in full swing and an anxious public still reeling after the convictions of Alger Hiss and CPUSA leadership—was to risk everything.

The year after his term as Guild president ended Emerson co-edited (with David Haber) the first bona fide casebook on individual liberties, *Political and Civil Rights in the United States*.³² According to longtime University at Buffalo law professor Jacob D. Hyman's 1953 assessment in the *Harvard Law Review*, it "fills a serious gap in the legal literature,"³³ an academic and civic understatement if ever there was one. The casebook remedied a profound intellectual and ethical failing among the nation's law schools during the pre-Brown, McCarthyite era—that of not taking civil rights seriously enough. This was a failing Emerson would spend his long career with the Guild and as an academic working in intellectual overdrive to eradicate. His second great book, *The System of Freedom of Expression* (1970),³⁴ a synthesis and expansion of many shorter writings on the First Amendment published over a number of years, established him as his generation's preeminent First Amendment scholar. Countless future politicians and jurists enrolled in his classes, read his articles and treatises, and attended his lectures. His passing in the summer of 1991 marked a day of mourning for constitutional scholars, attorneys, and academics across the country who, directly or indirectly, had been influenced by his ideas or touched by his passion for a more expansive and egalitarian concept of liberty. Leading jurists wrote fond obituaries and reminiscences describing a person whose impressive professional accomplishments and lasting legal influence were, as impossible as it might seem, matched by the esteem and affection he had generated in those around him. But the defining characteristic of Emerson's career, even more essential to it

than his erudition or persuasiveness as an advocate, was his courage. There's a single line in one of these eulogies, almost buried amid the list of his more popularly recognized achievements, that most perfectly describes the kind of lawyer and person Emerson was, fighting not only for a cause, but for himself, his friends, and the organization he loved and spent years building. "Tom was the pivotal force that saved the National Lawyers Guild from extinction under the bludgeons of McCarthyism."³⁵

NOTES

1. THOMAS I. EMERSON, *YOUNG LAWYER FOR THE NEW DEAL: AN INSIDER'S MEMOIR OF THE ROOSEVELT YEARS* 5 (1991).
2. PETER IRONS, *THE NEW DEAL LAWYERS* 236 (1993).
3. 287 U.S. 45 (1932).
4. 372 U.S. 335 (1963).
5. Emerson, *supra* note 1, at 5.
6. Irons, *supra* note 2, at 236.
7. Thomas I. Emerson, *Address to the Convention: The Trend of American Democracy*, 11 LAW. GUILD REV. 194 (1951).
8. Harrison E. Salisbury, *The Strange Correspondence of Morris Ernst and J. Edgar Hoover*, THE NATION, Jan. 25, 2007, <http://www.thenation.com/article/strange-correspondence-morris-ernst-and-j-edgar-hoover> (*last accessed* July 31, 2012).
9. HOUSE UN-AMERICAN ACTIVITIES COMMITTEE, 81ST CONG., *THE NATIONAL LAWYERS GUILD: LEGAL BULWARK OF THE COMMUNIST PARTY 1* (Comm. Print 1950). More particularly, the report alleges that "as a subordinate of the International Association of Democratic Lawyers," which the report views as an international communist conspiracy controlled by Moscow, the Guild is "duty bound to comply with this directive in our own country." *See Id.* at 15. Emerson explicitly responded to this with: "The fact is that the Guild, although now affiliated with the International Association of Democratic Lawyers, is not a 'subordinate' of that organization and is not bound by any 'directive.'" *See* Thomas I. Emerson, *National Lawyers Guild: Legal Bulwark for Democracy*, 10 LAW. GUILD REV. 93, 97 (1950). He went on to point out that at the Guild's most recent national convention (May, 1950) it had passed a resolution officially "disapproving" of an action taken by this organization. *Id.* at 105-106.
10. *Id.* at 3.
11. *Id.* at 5.
12. *Id.* at 16.
13. *Id.* As evidence of this "unusual affinity," the report cites Emerson's association with the following groups: Conference for Human Welfare, National Council of the Arts, Sciences, and Professions, Progressive Citizens of America, and United Public Workers of America.
14. *See* Thomas I. Emerson, *Answer to the Report of the House Committee on Un-American Activities on the National Lawyers Guild*, 10 LAW. GUILD REV. 45 (1950). *See also* Victor Rabinowitz, *The National Lawyers Guild: Thomas Emerson and the Struggle for Survival*, 38 CASE W. RES. L. REV. 608, 613 (1987) (Guild co-founder Rabinowitz, who witnessed Emerson's presidency first-hand, credits Emerson with

writing *National Lawyers Guild: Legal Bulwark for Democracy*, though the document states it was the work of the National Executive Board).

15. Emerson, *supra* note 14, at 45.
16. Emerson, *supra* note 9, at 93.
17. Rabinowitz, *supra* note 14, at 608.
18. Emerson, *supra* note 14, at 45.
19. Emerson, *supra* note 9, at 93.
20. *Id.*
21. *Id.* at 97.
22. *Id.*
23. *Id.* at 104.
24. *Id.*
25. *Id.* at 105.
26. *Id.* .
27. *Id.*
28. *Id.* at 110.
29. ANN FAGAN GINGER AND EUGENE M. TOBIN, NATIONAL LAWYERS GUILD: FROM ROOSEVELT TO REAGAN 115 (1988).
30. Rabinowitz, *supra* note 14, at 615
31. See ANN COULTER, TREASON: LIBERAL TREACHERY FROM THE COLD WAR TO THE WAR ON TERRORISM (2003).
32. THOMAS I. EMERSON AND DAVID HABER, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES: A COLLECTION OF LEGAL AND RELATED MATERIALS (1952).
33. Jacob D. Hyman. *Political and Civil Rights in the United States: A Collection of Legal and Related Materials*, 66 HARV. LAW REV. 1346, 1346-1350 (1953).
34. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).
35. Norman Dorsen, *TRIBUTE: In Memory of Tom Emerson*, 101 YALE L.J. 317, 318-319 (1991).



Barbara Enloe Hadsell

BEN MARGOLIS: PORTRAIT OF A FOUNDER AS A YOUNG MAN

Ben Margolis (1910–1999), an icon of radical political lawyering in California for decades, was the son of Russian emigrants. As a result of pogroms in their rural villages, Anna Gerwits and Samuel Margolis emigrated separately to the United States after the 1905 Revolution. Ben’s father was about to be inducted into the Russian army, so he was avoiding the military as well. When they arrived in the United States, Anna and Samuel were in their late teens. They met, married and settled in the Jewish ghetto on the East Side of New York. Ben, their oldest son, was born April 23, 1910. Ben’s parents, their neighbors, and Ben himself mostly spoke Yiddish until he began kindergarten.



Though Jewish, Anna and Samuel were atheist radicals who considered themselves life-long socialists. Samuel eked out a bare living as a house painter and belonged to one of the left wing chapters of the International Workers Order.

When Ben developed a serious asthmatic condition as a child, doctors advised the family to move to California, and so Ben celebrated his seventh birthday on the train taking his family west. They settled in Sierra Madre, nestled in the foothills of the San Gabriel Mountains of Southern California.

Ben described his first day of school in Sierra Madre as a rather traumatic event which apparently did not keep him down for long: “[I] had my first contact with a way of life that was entirely strange to me when I came out here. I was just the sissy from New York who was dressed like a girl. I had a Buster Brown haircut, which was the kind of thing you had for your boy children in New York City, and wore white shoes and white little pants.... The first day I got beaten up by guys with bare feet and overalls.... I remember that my father...got me a haircut and let me get a different kind of clothes—all of which greatly distressed my mother—and I began gradually to become a Californian.”

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Ben's father was able to find considerable work in Sierra Madre as a house painter and, while by no means rich, the family lived in a small comfortable house, "much better than we had lived in New York City." Even though his parents were basically pacifists, when WWI broke out "it was nearly compulsory" to plant a flag outside your house and Ben, though only a child, knit socks for the war effort.

After about a year, the family moved from Sierra Madre to Santa Barbara, a considerably larger community located about ninety miles north of Los Angeles. Ben's father hoped for even more house painting work, though the move to Santa Barbara was most likely motivated by the fact that it was the residence of Anna's sister, with whom she was very close and who was also a radical.

Samuel found plenty of work, so much so that on occasion he hired others to assist him. He remained a staunch union member, albeit a very critical one, his entire life. Anna obtained work as a waitress at the "swank" El Encanto Hotel, located in Santa Barbara's Riviera district on a bluff overlooking the City. Ben recalled often visiting his mother during her night shift at the El Encanto. He sat in the kitchen where he ate dinner and was plied with "all kinds of goodies." Ben was "a voracious reader," devouring books while his mother worked, commencing with all the *Tarzan* books, followed by "hunks of the *Book of Knowledge*," thereafter graduating to Jack London, of whom he became very fond.

While "we never had a lot of money, . . . we were never in want," Ben recalled. Eventually, Ben and his parents moved into Santa Barbara's Mission area where they built a tiny grocery store, which Anna ran. The extra income enabled the family to buy a second hand Model-T car, which allowed the family to make occasional forays to Los Angeles to visit friends. "It was a four hour drive each way. If you made the round trip with only two flat tires, you were doing exceedingly well." They also occasionally drove to Santa Paula, about thirty miles away, to visit the Gussom family, who were left-wing Jewish friends of Ben's parents, as both couples "craved so for some political companionship." The Gussom's daughters eventually married two of the blacklisted writers whom Ben represented years later as part of the *Hollywood Ten*: Michael Wilson and Paul Jarrico.

Ben recalled his mother Anna as by far the dominant one in his parents' relationship. She was tall, perhaps six feet, a "very strong woman" who controlled the money and "pretty much ran things." Ben's mother was "always pushing my father to do a little more," including building the grocery store. Despite their temperamental differences, his parents were "very much in agreement on their political outlook on life, which was Left."

By all accounts, Ben's childhood in Santa Barbara was the norm for a precocious child. Ben engaged in lots of pranks with his friends, including "raiding and knocking over outhouses" during Halloween, soaping up cars, stealing watermelons from the surrounding fields and thereafter sitting on street corners with likewise wayward friends, throwing rinds at passing cars. "Fortunately, we weren't very good shots, and, as far as I know, we never hurt anybody or anything."

Ben graduated from Santa Barbara High School when he was sixteen, barely a few months after Anna died of a miscarriage. As it was difficult for Samuel to care for Ben's younger brother Harry, he felt he should remarry. Santa Barbara's population contained few Jewish families and so Samuel moved to San Francisco, where he married the woman who thereafter raised Ben's brother. Although "it had nothing to do with religious beliefs, . . . (i)t wouldn't even have occurred to him to marry anyone other than a Jewish person," Ben said. Ben's step-mother Etta was quite different from his mother, being very religious, but he thought she was a "very wonderful . . . fine" woman. Now in a much larger urban setting, Ben's father once again became active in the International Workers Order, attending meetings on a regular basis. He also became a member of a Jewish chorus, putting to use his "very good voice."

Ben stayed on in Santa Barbara, attending the two-year State Teachers College (which later became the University of California at Santa Barbara), while working as a night clerk with the Western Union Telegraph Company, earning \$75 a month. This "was enough to live on, quite comfortably, at that time," residing as he did in a boarding house which provided room, food, laundry services and such for about \$35–\$40 a month. Ben continued to read voraciously, including at least several hours a night while working at the telegraph office. "I wasn't at that stage reading anything political, but I was reading many, many quite good books as well as a lot of junk. I loved mystery stories. . . . I read almost anything. My tastes were indiscriminate rather than discriminate, but it included the good as well as the bad. I just loved to read."

Ben described himself as being very ambitious at the time, going to school from 8:00 in the morning to 4:00 in the afternoon and then working from 4:00 to midnight, six days a week. He earned extra money selling Christmas trees during the holiday season, and was generally "very, very busy," although he found time on the weekends to play tennis, his main recreational activity at the time.

While he was attending Teacher's College, Ben auditioned for and obtained a small part in a production of George Bernard Shaw's *Caesar and Cleopatra*, staged at the local theater and directed by Irving Pichel, whom

Ben represented many years later as one of the *Hollywood Ten*. After his two year stint at Santa Barbara's Teacher's College, Ben enrolled at the University of Southern California in the latter part of 1928. He did this at the behest of a slightly older friend from Santa Barbara, joining him in a Jewish fraternity and living in the fraternity house which was "one of the silly things I did in my life. . . . It was a typical fraternity with all of its emptiness. . . . Most of the people—remember this was '29—had their own cars (and you had to be rich in those days to have your own car). . . and spent more on little things than my income was for a month. . . . The only time I ever played bridge in my life was during my year there. . . . But it gave me a base, you know, with the only people I knew and I was accepted. I had friends and companions. . . . They were really very good to me. . . . I got opportunities that I wouldn't have had any other way."

Once again, Ben worked in the Western Union telegraph office, still pulling down \$75 a month and paying about \$40 a month to the fraternity for room and board. Though paid for a 40-hour work week, Ben was so proficient at his assigned job he was able to complete his work typically in 28 hours. "It was a good job." If it hadn't been for the Depression, Ben would most likely have attended USC law school. However, by that time, he knew that if he did continue at USC, he would not live in the fraternity house; as nice and as good as the brothers were to him, "none of them ever did anything of the kind that I was interested in."

The economy started souring as the country approached the Depression, and Western Union laid Ben off because of his low seniority. Never one to sit idly around, Ben scrounged up money doing odd jobs, including working as an extra in a number of Hollywood movies. Ben's film career included two or three Jack Oakie films and several football movies where he was recruited to play the part of one of the game attendees. "It was mob scenes...in which you cheered or something. . . . You work for maybe an hour, sit around for five or six hours and play cards. . . . It was really like a picnic." Though the studios paid \$25 a day ("That was a lot of money for a day's work, believe me."), it wasn't enough and the studios apparently weren't sufficiently impressed by Ben's "cheering" skills. At the end of his first year at USC and five months after being let go from Western Union, Ben packed it in and relocated to San Francisco. There, he moved in with his father, brother and step-mother, Etta.

Despite all his efforts upon moving to San Francisco, Ben was unable to find a job for a year, "the most miserable year of my life." When he eventually did find work, it was as a clerk and delivery boy for a market on Geary Street, "every minute of which I hated because it was just the dullest job." Western Union came to the rescue again when it offered Ben employment in its accounting department when someone else left. Still living at home,

Ben eventually earned \$85 a month “which was pretty good money in those days,” as you could get a “good dinner for 30 cents, 50 cents.”

Ben had decided to become a lawyer while attending Santa Barbara High School and taking a course in commercial law, in which he excelled. He “then and there decided to become a lawyer . . . I never changed my mind.” Acting upon this resolve and now in San Francisco, in 1929 Ben entered Hastings Law School, “the poor man’s Boalt Hall” (at the University of California, Berkeley). Most students attending Hastings “simply wanted to get out of the school and make a living . . . [which] was a pretty desirable objective. . . . Virtually everyone who went to Hastings worked,” typically six days a week, leaving school no later than 11:00 in the morning, and then going on to work. There was no or very little tuition and books cost \$25–\$30 per year, and “that’s what enabled me to get back into school.”

As anyone who knew him well was aware, Ben developed a lifetime habit of turning something which might be seen as a negative into something positive. This trait is exemplified in Ben’s comments concerning a law school professor at Hastings. The professor, who was the chief attorney general for California at the time he was also teaching classes, was “a very reactionary guy” who, from the standpoint of legal thinking, nevertheless “had the finest mind of anyone in that law school.” Ben described years later how this extremely conservative professor taught a course in sales in which he required students to spend nearly the entire semester analyzing just the first case in the textbook, “analyzing it and learning what made it tick and everything. By the time we finished that, the rest of the cases were easy.”

Ben attended Hastings for three years, the entire time putting in 30 hours a week in classes and studying, then working at Western Union about 40 additional hours a week. Anything he did other than school and work was social in nature. Ben’s law school class originally numbered 100. There were no blacks, no Latinos, no Asians; only 99 white males, and one white female student. By the time he completed law school, his class had been whittled down to fifty students. Ben graduated number two.

Though he was generally familiar with his parents’ radical socialist views from the earliest stages of his life, it was only after his mother’s death that Ben and his father really began engaging in political discussions. Though he had “no time” for much besides work and studying during law school and had not as yet become politically active, Ben “was thinking much more politically than I had been previously....I already knew that what I wanted to be was a labor lawyer,” a conclusion he reached from talking with his father and reading.

Ben’s friendships also reflected the growing political focus in his life. While he roomed for awhile in San Francisco with friends from his Santa

Barbara and USC days, his time with them was mostly spent “going out looking for girls and that kind of thing.” However, Ben was increasingly aware he wanted something more. When a very nice, but basically apolitical lawyer for whom he exchanged work for space soon after graduating from law school, embarked on efforts to marry Ben off to his likewise apolitical daughter, Ben bolted. As time went on, while he stayed friendly with his adolescent and college friends, Ben “just lost interest . . . because we had nothing in common . . . so we very much grew apart.” After attending his twenty-year law school reunion during the height of the McCarthy era in 1953, Ben decided never to attend another one “because it was just so dull, so uninteresting . . . None of them had any concern beyond their own immediate welfare: how well they were doing in the practice, how they could get ahead, and so forth.” The one critical exception was Myer Symonds, who was one of Ben’s Hastings classmates and who remained Ben’s steadfast and lifelong friend and ally in his political causes and concerns.

Ben studied for the bar and was admitted to practice in winter 1933, at the height of the Depression. That year the Bar passed the lowest percentage of those who took the exam before or since (29 percent). Ben took office space right around the corner from the Western Union Telegraph office, entering into an arrangement to exchange space for work with a lawyer who leased the space and who had made a successful career representing small business people. However, as things turned out, Ben did not do any work for this attorney “because he didn’t have any. My assistance to him consisted of going down from the sixth floor to the first floor to the cigar stand—they had a lot of cigar stands at that time in San Francisco—and getting him cigars.” So, Ben continued working part-time at Western Union, which remained his primary source of income. In the first couple months of his practice, Ben made “about \$250” handling several divorces, charging \$50 apiece.

At the end of sixth months, the cigar-loving lawyer committed suicide by jumping out his office window. “This was a man whose life had been destroyed. He was a comfortable middle-class lawyer who, all of a sudden, had nothing. And literally nothing—I’m not exaggerating—he just had nothing. He lost his entire practice. Had no place to go to get any new practice: there wasn’t any.”

In addition to his earnings from Western Union, Ben stitched together income from appointments as trustee in bankruptcy cases as a result of the efforts of his law school friend Myer Symonds, earning \$10–\$20 per matter. He also handled a few small patent and personal injury matters, one of which was successful beyond anyone’s wildest expectations, bringing in a nearly \$2000 jury verdict in a case against the city involving an elderly woman

breaking her leg falling in a pothole. Hardly presaging the supremely political lawyer Ben was to become, though his technical astuteness and strategic brilliance was already on display.

Ben put his growing political activism into practice, volunteering in the rather disorganized political campaign of Upton Sinclair, one of California's gubernatorial candidates in 1934. Ben's contributions were limited to helping to "get out mailings" and other "house-to-house stuff." He nevertheless remembered, "It was a terrific campaign from the standpoint of moving people and involving people. There were wonderful slogans: 'End Poverty in California,' 'Production for Use, Not for Profit.'" Though Sinclair did not characterize his campaign as a socialist one, "It was really a socialist platform" and Sinclair himself suffered "tremendous redbaiting during the campaign . . . It was an ideological battle from the beginning to the end."

Ben also found time to volunteer his skills in the Ted Mooney case which had arisen in 1916, a "time of great hysteria and anti-labor feeling." A bomb, placed in a suitcase at the intersection of Steuart and Market streets as a "preparedness day parade" was about to commence, was detonated by a clockwork device and killed ten and seriously injured many parade participants and onlookers. Ted Mooney, a union activist, was convicted of first degree murder in the death of one of the victims and sentenced to be hanged. President Woodrow Wilson intervened, Mooney's sentence was commuted to life imprisonment, and he was incarcerated in San Quentin. By the time Ben became involved in the case, Mooney had been in San Quentin for nearly twenty years, during which time he had become "a famous world-wide character . . . All over the world people were calling for his release. Not only radicals, but conservatives. It was a thorn even in the side of the conservatives and the reactionaries."

Mooney's attorneys filed a writ with the California Supreme Court, seeking his release on the ground that he had been convicted on perjured, unfair evidence and that the district attorney had conspired to use that evidence. The Supreme Court appointed a special master to take evidence and report back to it. Ben sought out the primary attorney handling the writ on behalf of Mooney and volunteered to analyze the trial transcript, dictating summaries of the key evidence from it. This endeavor took him several hours a day for a number of months, as the transcript was "twenty thousand pages or something." Ben characterized the record in Mooney's case as "absolutely unbelievable. I have seen lots of things in my career; I have never seen anything to compare with that. There was no question, it was definitely proved, that the district attorney. . . secured perjured evidence."

In the end, Ben's work came to naught as Mooney's release was effectuated as the result of a political rather than a legal act. Culbert Olson, who was sworn in as California's governor in 1938, gave his inaugural speech, stepped to the side of the podium and signed Tom Mooney's pardon on the spot. "So all of the work that I had done was never directly useful to anybody," Ben stated years later.

There were, however, two significant personal outcomes of his volunteerism. The first was that Ben was able to meet Mooney who, by this time, had been transferred from San Quentin to the county jail in San Francisco, where Ben visited him repeatedly. During his years in prison, Mooney had read widely, an attribute Ben clearly identified with. Moreover, Mooney had met many famous people and had written, powerfully, about his political beliefs. And, especially important to Ben, Mooney "loved to talk." "It was a very important thing to me to get to know this famous, worldwide, militant-working class leader."

Secondly, Ben "began to meet the labor people, because the labor movement was strongly in support of Mooney." These "labor people" included the legendary head of the International Longshoremen's and Warehousemen's Union (ILWU), Harry Bridges, as well as two young, newly admitted radical attorneys, Richard Gladstein and Aubrey Grossman, who had established their own firm. Ben was at the time located in the same building on Montgomery Street as the Gladstein and Grossman firm. He was again working for an attorney swapping space for work, primarily on divorces and matters pertaining to the California Tow Bridge (later "Bay Bridge") Authority which the attorney contracting his services represented. Again, not exactly the types of cases Ben dreamed of handling as his political beliefs solidified and grew increasingly impassioned.

Ben became friendly with Gladstein and Grossman who, though only three or four years out of law school, represented the ILWU, the Marine Cooks and Stewards Union and a "number of the militant trade unions of the time." Ben had won his first, difficult personal injury case and so Gladstein and Grossman began forwarding him personal injury cases to handle. "But that isn't really what I wanted. What I wanted was to get into the labor work, and gradually I started doing it." Another classic trait of Ben's to all who knew him: besides being exceptionally creative, he was exceptionally committed—once he had made his mind up to make something "happen," it usually did.

By labor work, Ben meant representing unions. "From the standpoint of what I wanted to do, I couldn't have graduated and started practicing at a better time. Because labor law developed when I was a young lawyer, I got in on the ground floor of labor law. [I] was opposing people (representing

the big corporations) who have practiced fifteen, twenty, thirty years, but who were as green in the field as I was, you see. It was a whole new field, so that you didn't come in as a young lawyer with the same kind of disadvantages you would have if . . . you were going to try a breach of contract case or something of that kind All of the labor legislation was in the process of being passed, and all was new. . . . We were entering an absolutely new field and I was among those who had the opportunity to enter it at that period."

Ben's determined will and wiliness is legendary, and how he made good on his resolve to become a labor lawyer is a perfect illustration of this. By the spring of 1937, a scant four years after graduating from Hastings, Ben joined his labor attorney friends and the firm became known as Gladstein, Grossman & Margolis. As Ben put it: "We often kidded about why they took me into the firm. I had established credit with a bank, where I could borrow up to . . . a couple hundred dollars. I had borrowed money to buy a car and I paid [the bank] back. Once you've done that, you've got credit. . . . They needed credit. We were drawing \$25 a week at that time, which wasn't all that bad, but there were weeks when the \$25 wasn't available. So I came into the firm and I was able to borrow money for the firm. Within a short period of time, I was spending all of my time doing labor work, which is what I had always wanted to do."

But Gladstein, Grossman, and Ben shared more than a need for credit to do the work; they believed in the work, passionately: "We used to have conferences, . . . [which] almost brought the building down. We were all very volatile; we shouted at each other. But we managed to work together We saw eye to eye politically. We saw each other as people who were going to change the world. We were going to have a socialist America. Didn't quite succeed, but we tried."

The firm represented the ILWU doing "all kinds of things," including attending conventions and drafting resolutions. Up until the time Ben left San Francisco and moved to Southern California in 1943, "there were only four honorary members of the union"—Gladstein, Grossman, Ben and Paul Robeson.

Some tactics the firm engineered in representing the ILWU involved what Ben characterized as springing from the creative imagination of the "brilliant, but erratic" Grossman, whose ideas "were either totally right or totally wrong." One of the ideas which "worked" involved putting out the call to the approximately 4,000 union members to attend a courthouse hearing set to determine whether to enjoin the 1937 longshore strike. Grossman exhorted members of the union, "This is your case. Go see what's going on." According to Ben, "You couldn't get into the courthouse. The streets, for blocks,

were blocked off. You couldn't get up the stairs. The judge couldn't get in. The police finally had to clear the way to get him in. And he continued the hearing without issuing an injunction."

When the Harry Bridges deportation case arose, Gladstein and Grossman, along with Carol Weiss King (one of the foremost immigration attorneys in the country) who came to the Bay area from New York, devoted all their time and energy to it for the better part of eight months. This left Ben picking up the slack on all the other union matters the firm handled, working 80–90 hour weeks. From this, Ben's incredibly intense involvement in and connection with the labor movement and ancillary people's causes steadily deepened, transforming Ben from an attorney who basically took whatever case walked in the door, into one of the most vigorous and effective "political" attorneys in California's legal history.

Ben joined in the founding of the National Lawyers Guild from San Francisco. He was in contact with the group of lawyers in New York City who laid the groundwork for the founding convention of the Guild in February 1937, and he helped set up the Guild's San Francisco chapter. He was active for nearly 60 years. He went on to represent members of the Communist party in Smith Act proceedings, and successfully handled the appeal in the "Sleepy Lagoon" murder case (focus of the play and movie *Zoot Suit*). He appeared before the HUAC commissions, represented the blacklisted Hollywood Ten, successfully argued *Yates vs. United States* before the U.S. Supreme Court, and took on a myriad of other just causes and cases—but all that will be the subject of a later article.

NOTES

1. This biographical note addresses Ben Margolis's early years and ends just prior to his taking on the first of the seminal cases and legal battles for which he became justifiably revered on the left. In drafting this brief overview of the early years of Ben's life, I am enormously indebted to the Oral History Program, UCLA and the stellar work of Michael S. Balter who, over the course of 1984 and 1985, undertook fourteen interviews of Ben, who regaled him with details of his upbringing and tales of his storied legal career. I have placed quotation marks around comments from Ben as they appear in this oral history, entitled *Law and Social Conscience: Ben Margolis* (The Regents of the University of California, 1987). This note covers a period ending decades before I met Ben, but what I have learned and relearned about this exceptional man in the course of writing this biographical sketch only reinforces the love, admiration and respect I felt for him in increasing measure once I joined the law firm of Margolis, McTernan, et al as an associate in 1981 and in the ensuing many years until his death in 1999, just a few months shy of reaching his 89th birthday.



Steve Babson

MAURICE SUGAR: SOCIALIST, ACTIVIST, LAWYER

“I met attorneys who were...suffering virtual ostracism because of their defense of those who otherwise would have been defenseless,” Maurice Sugar wrote of colleagues he encountered while traveling across the U.S. in 1933. “Most had contributions to make, but there was no clearing house— indeed very little contact at all.”¹



Sugar was one of the first to advocate a “clearing house” for progressive attorneys, a “united front in anti-fascist struggles,” as he described it, that would bring together “lawyers of various degrees of political and economic education.” When he became a member of the Guild’s first Executive Committee four years later, Sugar was already well-known for his role representing the United Auto Workers in the injunction hearings and court cases surrounding the Flint sitdown strike against General Motors—the turning point in the struggle to organize the CIO that ended in victory just one week before the Guild’s founding convention in February of 1937. Over the next ten years, he would go on to become a prominent leader of left-wing activists within the Guild and a defining influence on the organization’s policy and practice. As an early victim of the Red Scare, however, Sugar’s formative role would end abruptly after 1947, when he too was ostracized for his political associations.

Like many of his Guild colleagues, Sugar was a socialist born to immigrant parents from the *shtetls* of the Russian empire and Eastern Europe. Kalman and Mary Sugar had not, however, followed the usual path that took most Jewish immigrants to America’s urban ghettos. After brief stops in Baltimore and Detroit, they moved instead to Michigan’s Upper Peninsula in 1889, settling in the lumber-mill town of Superior (later renamed Brimley), where Kalman peddled goods to mill workers and eventually opened a dry-goods store. Maurice was born there in 1891 and raised in a secular household,

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isolated from other Jews. After the family moved back to Detroit in 1900 to ensure a better education for their children, Maurice graduated from the city's prestigious Central High School and enrolled in the University of Michigan's law department in 1910.²

It was in this milieu that Sugar became a socialist. Jane Mayer, his future wife, had grown up in a family of working class socialists before entering U-of-M on a scholarship, and it was her spirited and articulate radicalism that drew Sugar into Ann Arbor's "Socialist Intercollegiate Society." Maurice graduated in 1913, the same year he and Jane moved to nearby Detroit. Both became prominent leaders in Detroit's Socialist Party, Maurice especially so after the U.S. entered World War I, when he became a fearless partisan of the anti-war movement. After the Espionage Act made advocacy of draft resistance a federal crime, the U.S. government launched a nationwide dragnet that swept up Sugar and an estimated 10,000 others, charging them with failure to register for the draft and "conspiracy to obstruct" its operation. Following his conviction on these charges, Sugar served a ten-month prison sentence in 1918-1919.

When he emerged from prison at the age of 27, Sugar had no doubts where he stood as a lawyer: he was on the outside of accepted practice, engaged in a sharp and continuing conflict with the status quo. This had a literal meaning after conservative leaders of the Detroit Bar Association had him disbarred as a felon in 1918. He only won reinstatement in 1923, aided by his friend and colleague, Frank Murphy, a fellow U-of-M alumnus who went on to become Mayor of Detroit, Governor of Michigan, and Supreme Court Justice. Restored to the state bar, Sugar became the legal champion of the poor and Detroit's struggling unions. His effective defense of strikers and progressive union leaders in the 1920s and early 1930s won him little in the way of income, but a long-lasting loyalty from a diverse spectrum of labor activists, including liberals and moderate socialists, AFL union leaders as well as Communists.

As one of the few white attorneys who would represent black clients, he also gained a substantial following in Detroit's African American community. Sugar remained a Marxist throughout his life, though he no longer paid dues to a particular party. The Left had split into warring factions after the war, and Sugar, like many socialists, refused to make a public commitment to any of the splinter groups that emerged from the wartime repression. The Socialist Party could still draw nearly a million votes for Eugene Debs in 1920, but the party was wracked by factionalism and lost members throughout the 1920s. The doctrinaire purity of its chief rival, the Communist Party, was repellent to Sugar, who could not abide the CP's rhetorical assertion that all liberals were "agents of the bosses," as one leaflet described Mayor Frank Murphy after his election in 1930. Sugar had little reason to marginalize his legal practice

and narrow his political options by joining the CP, especially in light of his recent disbarment. His chief biographer, Chris Johnson, aptly summarized Sugar's complex relationship to Detroit's communist movement in these years:

Politically, he could agree neither with its hyperradicalism nor, especially, with its position on political involvement and on relationships with existing trade unionism.... Sugar thus became fixed in the political stance that he would retain for the rest of his life: an independent Marxist with a deep respect for the Soviet experience and an equally deep respect for the Debsian principles of broad unity of the Left, opposition to ideological nitpicking, full support for industrial unionism... and the building of a true workers' party in the United States.³

The year 1935 was crucial for Sugar and many others in the Guild's founding cohort because it was at this moment that the Communist International called for a new strategy, the "Popular Front," in which communists would abandon their revolutionary rhetoric and join coalitions with liberals and moderates to oppose the rising tide of fascism in Europe and elsewhere. Sugar had already shown the potential of the Popular Front earlier that year by running as a candidate for judge on Detroit's Recorder's Court. He didn't win, but with heavy support in ethnic and African American neighborhoods, he garnered a respectable total of 64,000 votes in the non-partisan election. It was a tribute to his hard work as a candidate, but it also attested to the trust he had won over the years as a champion of the city's poor and dispossessed. He was especially popular among labor activists who favored a broader-based movement that enlisted skilled and unskilled workers, blacks and whites. "While Maurice Sugar failed in the election," as the AFL's Detroit Labor News editorialized, the "votes cast for him by Detroiters, in spite of the silence campaign by the daily newspapers, was a splendid tribute to his outstanding qualities both as an attorney and as a man."⁴

Running for office gave Sugar the opportunity to put his analysis of capitalism's many failures in front of a growing number of voters radicalized by the Great Depression. But this radical critique was merged with an abiding commitment to the defense of civil liberties enshrined in the U.S. Constitution and the Bill of Rights. Judges might subvert the Constitution and interpret it in ways that served the dominant class, but Sugar believed there was an underlying bedrock of equal rights and procedure that served the vital needs of an egalitarian protest movement. "Procedure is important, often vital" as he put it years later:

Many of the provisions of the Bill of Rights are procedural in nature. The provisions relating to searches and seizures, to self-incrimination, to the right to trial by an impartial jury, to confrontation by witnesses, and to the requirement of due process are all procedural. The concept that one is presumed innocent until proven guilty beyond a reasonable doubt is a procedural concept.... Indeed, it is by procedural requirements that the substance of democracy is preserved.⁵

This was “bourgeois democracy” to be sure, but the American Revolution and the Civil War amendments to the Constitution had won the vital principle of universal rights and equality before the law. As second-generation ethnics whose immigrant parents knew first-hand what it meant to live without such protections, Sugar and many of the NLG’s co-founders shared a common conviction that the Constitution—even in capitalist Detroit—could serve the working class. This did not mean they believed that judges or juries were the arbiters of social reform. In a becoming spirit of humility, Sugar would hold that what went on in the courtroom merely registered victories or defeats decided in the streets, on the picket lines, and at the ballot box.

Sugar would run for office again, almost winning election in 1937 to Detroit’s city council on a “Labor Slate” that included Walter Reuther, the future president of the UAW. Running for elected office was not unusual for a lawyer of any political stripe—then or now—but it was Sugar’s simultaneous commitment to worker mobilization and direct action that made him and fellow Guild members radically different from most attorneys.

A classic example of his approach occurred in 1937, during Sugar’s first stint as counsel for the UAW. As the union’s lead attorney, he was responsible for the legal challenge to the ordinance passed by the city of Dearborn, home of the Ford Motor Company, restricting distribution of handbills to those certified as “truthful” by the city clerk. Sugar filed the necessary court complaint addressing this violation of free speech, but he also persuaded the union’s leadership that only a mass movement could force such an issue to the forefront of judicial consciousness and compel upholders of the status quo to reconsider bad law. The challenge for the lawyer, then, was to develop a legal strategy that was both principled in its challenge to the status quo, at the same time it was pragmatic in its day-to-day navigation of bad law. In the case of the Dearborn anti-leafleting ordinance, Sugar had noted that Dearborn’s handbill ordinance only banned the unauthorized distribution of “circulars and handbills.” He therefore stipulated that when 1,000 union members arrived in front of the Ford plant, they would only distribute free copies of the UAW newspaper. The union was technically in compliance with the Handbill Ordinance, and the presence of State Police and NLRB observers kept Ford’s notorious goons at bay. Following repeated rounds of civil disobedience over the next three years, with hundreds arrested for leafleting on city streets, the state courts finally invalidated all of Dearborn’s handbill ordinances.⁶

Another compelling example of Sugar’s grasp of legal history and its relation to present-day struggles involved the issue of picketing. By an 1898 ruling of Michigan’s Supreme Court, picketing was declared inherently coercive and therefore illegal in Michigan. Though this ruling was not always applied during strikes, it remained on the books until 1940, when the U.S.

Supreme Court—in a decision written by Frank Murphy—declared that peaceful picketing was a form of free speech protected by the Bill of Rights.

In the meantime, as the great campaigns to gain union recognition unfolded in the 1930s, the prohibition on picketing was frequently invoked by employers. The challenge for the union was to avoid or delay the company's recourse to a court injunction that would empower the police to clear the streets. Sugar knew of a useful precedent from English history. From the fourteenth century onwards, England's landed gentry had fenced in the best land at an accelerating pace, evicting peasants from the ground they had tilled or shared by customary right. Wealthy landowners would seek approval for these "enclosures" in the courts of equity, and Sugar was struck by the impatience of the English gentry to secure an immediate ruling from the courts, before the poor could present their case. It was that impatience that reminded him of Detroit's industrialists and their haste to secure an injunction against picketing. It also called to mind a unique feature of the law of equity. In the English case, the courts had adopted a custom that only men of good repute could petition for an injunction to uphold their claims; if it could be shown that a petitioner had engaged in nefarious activities—that he had "unclean hands"—then he could be denied injunctive relief.⁷

With so much of American law derived from English precedent, Sugar could invoke this ancient principle to postpone if not block an immediate injunction against picketing. When a company approached the court seeking enforcement of such an injunction, Sugar would argue that it was first necessary to determine whether the company's "unclean hands" disqualified it from the court's protection. In 1936 and 1937 the Senate Sub-Committee on Civil Liberties chaired by Senator LaFollette had compiled reports of widespread illegal practices by employers, including physical assault, spying on pro-union workers, and illegal firings to punish pro-union speech. Using this record, Sugar would recite the company's violations of the National Labor Relations Act. The stage was set, as described by Sugar's collaborator and Associate UAW Counsel, Ernie Goodman:

When the injunction hearing took place, the courtroom would be filled with workers, sometimes jamming the adjoining hallway and occasionally extending to a picket line encircling the courthouse. . . . Then Sugar would rise and, to the amusement of the workers, he would quote from decisions of the King's and Queen's Bench as far back as the 17th and 18th centuries, and from early decisions of U.S. state courts. As the audience observed the growing consternation of the judge, he would restate the old 'unclean hands' rule which he asked the judge to apply in this case.⁸

For as long as the judge permitted, Sugar would take the opportunity to argue all over again the injustice of the company's actions; and while that argument continued, so did the picketing.

Sugar's "mobilization" approach to the law brought workers into the legal process as active participants—rallying at the courthouse, packing the courtroom, or putting their bodies on the line in acts of civil disobedience that challenged bad law. The alternative, in which lawyers argued the case behind closed doors, made workers passive beneficiaries of this "legal expertise"—leaving them disengaged and, therefore, all the more vulnerable to rumor and demoralization as the slow-moving process made its way through distant courtrooms.

Even within the Guild there was no easy unanimity on when—or whether—the mobilization model was the better choice, a fact highlighted in 1942 when union attorneys debated how they should challenge state laws restraining the free speech of union organizers. At a planning meeting convened by CIO chief counsel Lee Pressman, Sugar and Goodman proposed that CIO President Phil Murray go to Texas and publicly violate the state law prohibiting solicitation of union membership without paying for the same commercial license required of insurance salesmen and real estate brokers. Pressman and the majority of union counsels at the meeting—all or most of them Guild members—vetoed this approach in favor of an expedited legal challenge that would ask a judge to quietly enjoin the law as unconstitutional.⁹

Never one to stand down when he thought he was right, Sugar persuaded R.J. Thomas, Reuther's predecessor as president of the UAW, to go to Texas and carry out the proposed civil disobedience. Thomas was duly arrested after appearing before a rally of over 1,000 union supporters and asking one of them, by name, to join the union—an act of civil disobedience that drew national attention to the issue. The case came before the U.S. Supreme Court in 1944, with the union's brief argued by Lee Pressman—now supportive of Sugar's approach—and Goodman. Sugar could not appear on behalf of the legal strategy he had articulated, since his felony conviction in 1918 automatically disbarred him from federal court. But he was the principal author of the brief and the public advocate for its merits. "Unions," he wrote, "are democratic organizations of the people. They are not operated for profit. They merely serve as instruments through which the workers exercise their civil liberties of free speech, press, and assembly." Sugar deftly broadened the argument to make it resonate with the widest possible audience. "When a labor organizer—or any worker, for that matter—asks another worker to join a union, he is entitled to the same protection afforded by the Bill of Rights to a minister who asks one to join his church." The arrest of Thomas was therefore not just important to workers and their unions, "but to all the people of America."¹⁰

The Supreme Court's decision upholding these arguments in *Thomas v. Collins*¹¹ established that even when a license to speak was cheap and easy to

get, free speech must really be free, and not merely cheap. It was one of many precedents that Sugar helped establish, not only in matters of law, but also its practice. During his 1935 campaign for Recorder's Court, Sugar took steps to desegregate the Hoffman Building, where the International Labor Defense (ILD) rented offices. When the Hoffman's manager informed the ILD that its integrated clerical staff violated the building's covenant and that "we must ask you either to discharge your colored help or leave the building," the ILD refused to do either. After a two month stand-off, the building's owner relented and—amid considerable publicity in the black community favoring Sugar's candidacy—the covenant was abolished. Twelve years later, his office became the first integrated legal practice in Michigan when Sugar recruited George Crockett—a future Recorder's Court judge and U.S. Congressman—onto his roster of allied attorneys. Crockett became the first black lawyer in downtown Detroit at a time when area restaurants still refused him service and the Barlum Tower, where Sugar's offices were located, was directing black clients to the freight elevator rather than the whites-only passenger elevators.¹²

Sugar left an especially indelible mark on the case law that defined the scope—and limits—of the National Labor Relations Act. The U.S. Supreme Court had only upheld the NLRA's compatibility with the Constitution in 1937, just as the militancy of the sit-down era was peaking. Thereafter, as the economy slumped and employers mounted a fierce counterattack, Sugar took the lead in testing the NLRA's unchartered potential for certifying unions and protecting workers' rights. "The organization of workers into our Union," he wrote to UAW president Thomas in 1939, "and their retention, once organized, often depends upon action or lack of action under the Act. I am of the opinion that great value will follow upon diligent work in this field." By 1941, Sugar had made good on this promise by bringing 15 major complaints before the National Labor Relations Board, covering more than 4,000 union supporters illegally fired by the Ford Motor Company. Sugar not only persuaded the NLRB to order the reinstatement of these union supporters, but to also prohibit Ford's coercive browbeating of workers on the job with verbal threats—explicit and implied—for any who supported the UAW. When Ford refused to comply, the NLRB took the first of these precedent-setting cases to the U.S. Court of Appeals, seeking a court order validating its power to force compliance with the law.¹³

Ford's lawyers condemned the Board's alleged prejudice against business and invoked the First Amendment as defense of Ford's workplace speech—coercive or otherwise. The NLRB, echoing Sugar's argument of the case, made no argument against Ford's right to preach against the union outside the factory; but inside the plant, the company's campaign to force workers to sign loyalty oaths was inherently coercive, particularly when the supervisors who

demanded such fealty had the power to fire “disloyal” workers. Edward Bernard, a local power in Michigan’s Republican Party, claimed to know the real source of the NLRB’s brief in this and other matters. Every time the Board’s attorney rose to speak, “it’s been exactly as though Mr. Sugar were on his feet.” There was some truth to this, for Sugar’s meticulous presentation of the evidence to NLRB investigators certainly played a role in shaping the case.¹⁴

When the Appeals Court finally rendered a decision in 1940, it was a mixed result for Sugar and the UAW. In a unanimous decision written by Judge Charles Simons, the Court ordered Ford to reinstate workers and to cease and desist from “threatening, assaulting, beating, or in any other manner interfering” with union leafleters in the vicinity of the Rouge plant. But in a partial victory for Ford and employers generally, the Court also distinguished between explicit threats to punish union supporters, which were illegal, and the implied threats contained in Ford’s workplace propaganda. Ironically, the Court cited the very existence of the NLRB as the principal reason for refusing to further curtail Ford’s speech. With passage of the NLRA, wrote Judge Simons, “the servant no longer has occasion to fear the master’s frown of authority or threats of discrimination for union activities.” It apparently did not occur to Judge Simons that a process requiring more than three years to adjudicate was not one which most workers would find reassuring, particularly when, as the Court noted, “the orders of the Board are preventive and remedial and not in any sense punitive.”¹⁵

As subsequent court decisions and legislation further restricted the NLRB’s power to restrain employer coercion, Sugar would come full circle in his assessment of the Wagner Act. The final straw was the Taft-Hartley Act of 1947, which gave explicit protection to employer speech opposing unions while also imposing a non-communist oath on union officers. It was the non-communist oath in particular that drove Sugar to the same conclusion articulated by ACLU Director Roger Baldwin in 1935. Baldwin had initially opposed the National Labor Relations Act on the grounds that the NLRB would inevitably be subordinated to business interests and shackle the labor movement. Others on the ACLU board had pressured Baldwin to rescind his public opposition and remain neutral in 1935, and Sugar had been one among many in the CIO who had subsequently welcomed government regulation of labor relations. But with Taft-Hartley now imposing a political litmus on workers and unions seeking its protections—and, as many pointed out, imposing no comparable test on the corporate leaders who now held sway in Washington—Baldwin’s initial prognosis seemed confirmed.¹⁶

Guild members across the labor movement had to come to terms with this emerging configuration of state power. In the UAW, Sugar counseled non-

compliance with the Taft-Hartley oath. Signing the affidavits “would appear to be unnecessary,” as he put it in a pamphlet co-authored with Crockett and Goodman, “in view of the stated policy of the International Union not to use the facilities of the Labor Board.” The union had organized without the NLRB before 1937, Sugar argued, and it could do so again. It was a call to working class independence and freedom from government thought-control that even the crusty old coal miner and part-time Republican, John L. Lewis, could endorse. Lewis could afford to, since no other union would dare challenge his United Mine Workers in the coalfields. For the UAW, however, it was another matter. Walter Reuther, the union’s newly elected president, argued for compliance as a matter of survival, since there were AFL unions competing for members in dozens of metal-working industries who were eager to sign the Taft-Hartley oath, giving them an open field in NLRB elections where the UAW’s refusal to comply would keep them off the ballot. Rawboned militancy could not easily overcome these odds even when supported by the members, and there was little prospect in 1947 that workers were willing to return to the combative tactics of the 1930s. Reuther was able to persuade most of the left-wing members of the Executive Board to either abstain or vote in favor of compliance with the Taft-Hartley non-Communist oath. Sugar’s counsel was repudiated.¹⁷

After Reuther won complete control of the UAW Executive Board at the union’s 1947 convention, it was a foregone conclusion that Sugar’s days were numbered as Chief Counsel. Sugar, after all, had long served as the political advisor and confidant of Reuther’s left-wing opponents in the UAW, and it was understandable that the union’s president would seek alternative counsel he could trust. Few anticipated, however, the invective that accompanied Sugar’s dismissal. In the context of a widening Red Scare inflamed by Cold War conflict with the Soviet Union, he was denounced as a communist sympathizer if not outright member of the Party, vilified as a secret collaborator with America’s enemies who had overcharged for his services and tailored his legal advice to serve factional interests. Sugar had, indeed, been closely aligned with communists and other leftists in the union, but it was otherwise a patently false litany of charges designed to destroy his standing within the labor community.¹⁸

Sugar’s rapid fall from grace underscored the dilemma facing any progressive attorney, then or now: how do you make a secure living when your clients are either highly politicized labor organizations or individual workers and poor people who are, by definition, the least capable of paying? The formation of the Guild in 1937 represented a partial answer, providing a network of contacts, advice, and solidarity that buoyed the otherwise lonely progressive. But the difficulty in finding paid work remained. Workers compensation cases taken

on a contingency fee were one option; all the better if you could land a salaried staff job with a New Deal agency or the rising labor movement. But working for a union could be a precarious undertaking in its own right, as Sugar had learned in 1938 when Homer Martin, the UAW's first elected president, fired him and other left-wing opponents within the union. The UAW's progressive caucus vanquished Martin the following year after exposing his secret ties to the Ford Motor Company, but Sugar had thereafter declined to become a staff attorney dependent on a single client. Instead, he had signed a contract with the UAW in 1939 that made him the union's chief counsel, even as he retained an independent practice in his downtown offices. His roster of allied lawyers, led by Ernie Goodman, worked as subcontractors for a wide range of clients, including the Auto Workers. Contrary to the unfounded slander that accompanied his dismissal in 1947, Sugar's allied attorneys had charged rock-bottom fees indexed to the pay of UAW skilled tradesmen. "It didn't make any difference," Goodman recalled years later, "whether I was going into the lowest court in the community for a traffic case, or whether I was arguing a case before the United States Supreme Court, my time was \$5 an hour, and that's what I was paid. It's rather unique I think, but Sugar wanted to get the lowest price he could for the [union]."¹⁹

By maintaining an independent practice with multiple customers, Sugar had hoped to insulate himself from the consequences of a political falling-out with a single client. He had not anticipated what would happen after 1947, for Reuther not only terminated Sugar's contract, he subsequently promoted a boycott of his firm that severed Sugar's ties with centrist unions and liberal organizations. The boycott became all the more damaging as the Red Scare deepened and left-wing unions—Sugar's remaining clients—were expelled from the CIO and decimated by raiding.

It was a slow death for the once proud firm, and an especially difficult one for Sugar. Where once his stature had generated a kind of gravity that attracted attorneys to the firm, now, as his reputation diminished, so did his ability to hold together what had always been a confederation of potential competitors. Sugar could not reverse a process that made him an actual liability to anyone associated with him. The pain of it would drive him away from Detroit to ever longer stays on the shores of Black Lake, at the far tip of Michigan's lower peninsula, where he and Jane had built a secluded hideaway. As early as March of 1948, when he was invited to give a speech in Detroit on the Red Scare, he opened his remarks by acknowledging that he had been "asked to come out of what had been a long period of hibernation." In fact, he never really did. Slowly, he was withdrawing from the practice of law and his lifelong involvement with the labor movement. By 1950, the separation was complete, marked by the organization of a successor firm led by Ernie

Goodman and George Crockett—the future president and vice president, respectively, of the National Lawyers Guild.²⁰

Before his death in 1974, Sugar lived to see the revival of progressive politics and the resurrection of the Guild, led by the two men he had mentored in Detroit, Goodman and Crockett. It was these two who led the Guild's recovery from the depths of the McCarthy era, when just 489 members remained on the rolls in 1957—less than a tenth of the NLG's original membership twenty years before. In 1963, as the civil rights movement gained momentum, Goodman and Crockett called upon the Guild to abandon its bunker mentality and the accompanying emphasis on “position papers,” and concentrate instead on putting members in the field as front-line defenders of civil rights workers in the South. The call to a revival of activist law, with lawyers embedded in the movement and tailoring their legal strategy to augment and protect direct action, was Sugar's living legacy. It was also the beacon that drew a new generation of attorneys and law students to the Guild's banner from the anti-war, feminist, and environmental movements that followed. By 1987, the Guild's membership had climbed to over 8,000 members.²¹

Sugar's institutional legacy is equally impressive, most visibly in Detroit's “Maurice and Jane Sugar Law Center,” a non-profit public-interest group with a well-deserved reputation for legal advocacy on behalf of working people and their communities. Other legacies are less obvious. The American Association for Justice, previously known as the Trial Lawyers Association, grew to its present stature from roots that stretch back to the Sugar firm: in 1946 it was Ben Marcus, an associate member of Sugar's law practice, who organized ten other attorneys into the founding conference of what they optimistically called the “National Association of Claimants Compensation Attorneys.” The annual Buck Dinner in Detroit is another inheritance from Sugar's life, a fundraising banquet that Sugar began in 1929 with a venison feast for fellow deer hunters, now grown to 700-plus contributors who raise tens of thousands of dollars for progressive causes.²²

And then there are *the hats*—the fluorescent green baseball hats that Guild observers wear when they go to demonstrations and picket lines to monitor police behavior and advise people of their rights. The practice of sending legal observers “into the field” began in Sugar's day, though fluorescent green wasn't then a marker of the Guild's presence. Today, the green hats are the most tangible symbol for many of what the Guild stands for: an activist conception of the law that puts lawyers on the front lines of the struggle, in direct opposition to the legal norms of an exploitative status quo.

Maurice Sugar helped stamp that movement-orientation into the Guild's organizational DNA. He would have looked good in fluorescent green.

NOTES

1. WRL = Walter Reuther Library, Wayne State University. Ann Fagan Ginger and Eugene Tobin, eds., *The National Lawyers Guild: From Roosevelt through Reagan* (Phila.: Temple University, 1988), 7-8.
2. Details of Sugar's early life, education, and political development are taken from the excellent biography by Chris Johnson. CHRIS JOHNSON, *MAURICE SUGAR* (1988).
3. JOHNSON, *supra* note 2, at 99.
4. The quote from the *Detroit Labor News* appears in Johnson's *Maurice Sugar*. JOHNSON, *supra* note 2, at 163.
5. Johnson, *supra* note 2, at 102-103.
6. STEVE BABSON, DAVE RIDDLE, DAVID ELSILA, *THE COLOR OF LAW: ERNIE GOODMAN, DETROIT, AND THE STRUGGLE FOR LABOR AND CIVIL RIGHTS* (2010), 98-99; JOHNSON, *supra* note 2, at 225-226.
7. For a summary of the "Beck" decision of 1898 and examples of its application, see Maurice Sugar, *The Good Old Days*, typescript of a speech to the Detroit Chapter of the National Lawyers Guild, 16 September 1960, 5-9, WRL, Ernie Goodman Collection, Box 27, Folder: "Sugar Memorial." On Murphy's ruling in *Thornhill v. Alabama*, see SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS (1984), 169-179.
8. Ernie Goodman, *Foreward*, in MAURICE SUGAR, *THE FORD HUNGER MARCH* (1980), 21-22.
9. BABSON, RIDDLE, ELSILA, *supra* note 6, at 111-112; GILBERT GALL, *PURSUING JUSTICE: LEE PRESSMAN, THE NEW DEAL, AND THE CIO* (1999), 161-163.
10. BABSON, RIDDLE, ELSILA, *supra* note 6, at 112-116; GALL, *supra* note 9, at 163-175. Quote from Maurice Sugar, "Texas and Thomas," [UAW] Ammunition, undated, WRL, Ernest Goodman Collection, Box 19, folder, "R. J. Thomas."
11. 323 U.S. 516 (1945)
11. BABSON, RIDDLE, ELSILA, *supra* note 6, at 159-160; JOHNSON, *supra* note 2, at 160; Interview of Ernest Goodman by Tom Lonergan, 20 May 1989, author's possession, 1-3; Art McPhaul Oral History, interviewed by Norman McRae, 5 May 1970, Blacks in the Labor Movement Collection, 5, WRL.
12. Maurice Sugar to R.J. Thomas, 24 April 1939, 11, WRL, Sugar Collection, Box 4, Folder: 5; BABSON, RIDDLE, ELSILA, *supra* note 6, at 95-101; JOHNSON, *supra* note 2, at 239-240.
13. JOHNSON, *supra* note 2, at 245.
14. NLRB v. Ford Motor Co., 6th Circuit Court of Appeals, 8 October 1940, F2d. 114, 905-916. The Supreme Court refused to review the decision in February, 1941.
15. JEROLD AUERBACH, *LABOR AND LIBERTY: THE LAFOLLETTE COMMITTEE AND THE NEW DEAL* (1966), 18-19, 25-28.
16. BABSON, RIDDLE, ELSILA, *supra* note 6, at 161-163; Maurice Sugar, "Analysis of the Taft-Hartley Act and Instructions to UAW-CIO Local Unions," 26 page saddlestitch pamphlet, Section VII, and R.J. Thomas, "To Recording Secretaries of All Unions, UAW-CIO," 3 November 1947, and George Addes to Walter Reuther, "Subject: Poll of Board on Signing Taft-Hartley Affidavits," 31 October 1947, and Press Release of UAW-CIO Public Relations Department, 31 October 1947, all in WRL, Walter Reuther Collection, Box 65, Folder 2; Ernest Goodman to Maurice Sugar, "RE: Taft- Hartley Bill," 22 August 1947, WRL, Maurice Sugar Collection,

- Box 76, folder 76-9; JOHNSON, *supra* note 2, 295-296; “Proceedings of the Eleventh Convention, 1947, of the [UAW],” 9-14 November 1947, 92. The non-Communist oath was repealed by the Landrum-Griffin Act of 1959 and replaced by a section making it a criminal offense for any past or present member of the Communist Party to serve as a union officer or employee. The Supreme Court ruled this provision an unconstitutional bill of attainder in *U.S. v. Brown*, 381 U.S. 487 (1965).
17. BABSON, RIDDLE, ELSILA, *supra* note 6, at 157-166. For the blow-by-blow attack on Sugar’s integrity that accompanied his dismissal, see the Stenographic Record, Board Meeting—Fort Shelby Hotel—Detroit, Nov. 28—December 1, 1947, WRL, Maurice Sugar Collection, Box 4, Folder: 4-20.
 18. BABSON, RIDDLE, ELSILA, *supra* note 6, at 81-82, 141-142. The quote is from “Counsel for the Common People, Part 3-4,” videotaped interview with Ernest Goodman, produced by William Bryce, WRL.
 19. “Speech of Maurice Sugar at the Rogge Meeting Held on March 25, 1948,” WRL, Maurice Sugar Collection, Box 5, File 5-5; BABSON, RIDDLE, ELSILA, *supra* note 6, at 168, 180-185.
 20. On the Guild’s campaigns in the South led by Goodman and Crockett, see BABSON, RIDDLE, ELSILA, *supra* note 6, at chapters 9 and 10. 1957 membership cited in National Lawyers Guild, “National Executive Board Minutes, Report of the Secretary,” 27 October 1957, 1, WRL, Harold Norris Collection, Box 15, Folder 19. 1987 membership cited in GINGER & TOBIN, *THE NATIONAL LAWYERS GUILD*, xx.
 21. See BABSON, RIDDLE, ELSILA, *supra* note 6, on the origins of the Trial Lawyers Association, 143, and the Buck Dinner, at 86, 229-232.



Brent E. Simmons

CHARLES HAMILTON HOUSTON

Charles Hamilton Houston was born in racially segregated Washington, D.C. in 1895. That same year, Homer Plessy was arrested for taking a seat in a railroad car reserved for whites only. In 1896, the U.S. Supreme Court rejected Homer Plessy's claim that his arrest and conviction violated the Equal Protection clause of the Fourteenth Amendment and upheld Louisiana's segregation law under the doctrine of "separate but equal." Overturning *Plessy v. Ferguson* was to become Charlie Houston's life mission.¹



Charlie's father, William L. Houston, was a federal government clerk, who was also enrolled in the evening law school program at Howard University. Eventually he was able to quit the government job and start his own law practice. Charlie's mother, Mary Hamilton Houston, worked as both a seamstress and a hairdresser for an affluent white clientele. The family lived on the outer edge of the "Strivers Section" in the District, a residential area of well-to-do African American professionals dubbed by *The Washington Post* as the "Negro Aristocracy."²

As an only child, young Charlie Houston "was reared in middle class comfort, sheltered from many of the harsh realities that most Negroes experienced."³ His parents carefully attended to his intellectual and academic development with books, visits to the zoo, concerts, the theater, and piano lessons. He was enrolled in nationally renowned M Street High School, established in 1870 as one of the first college preparatory high schools for African Americans in the nation. Charlie graduated first in his class at age 15. He went on to Amherst College in Massachusetts, graduating Phi Beta Kappa in 1915. He then taught English and "Negro Literature" at Howard University from 1915 to 1917.⁴

As his distant cousin William H. Hastie later wrote, "At that stage in his career, Charlie was living a rather comfortable and somewhat secluded life

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and not very acutely or painfully disturbed by American racism. If he was not pleased with the status of the Negro, he was not greatly moved by it and had no passionate concern to change it.”⁵ That would change abruptly, however, as a result of Houston’s experiences as a young black army lieutenant serving in France during the First World War:

[Charlie] suffered all of the indignities, humiliations and crass injustices that the American command and white “comrades in arms” heaped upon black officers and enlisted men. His comfortable and protected upbringing made him less prepared for this experience than were most black soldiers. It seared him to be treated as a despised inferior by whites to whom he was vastly superior by any measure. And the mark of that branding and its pain would ever remain with him. He acquired a new sense of kinship with his black brothers. He went into the army a well-educated but rather pampered and self-satisfied youth. He came out a much wiser and tougher man with a hatred for American racism that he never wore on his sleeve but would always retain as a motivating force.⁶

At one point, Houston and two other black officers were nearly lynched because one of them had been in the company of two white French women.⁷ “In 1919 there were 78 lynchings [in the U.S.], 10 of the victims were still wearing their army uniforms.”⁸ As race riots erupted in Washington, D.C. and across the country that summer,⁹ Houston applied and was admitted to Harvard Law School. He enrolled in September 1919. Committed to transforming a society rooted in racism and the legal system that sustained it, Houston first set about the task of completing his own transformation.

At Harvard, Houston studied under some of the greatest legal minds of the period, including Roscoe Pound and Felix Frankfurter. He excelled academically and was the first African American elected to the editorial board of the *Harvard Law Review*. He graduated in the top five percent of his class in June 1922 and remained at Harvard an additional year to become one of the few legal scholars in the country to be awarded the advanced degree of Doctor of Juridical Science. A recipient of the Sheldon Traveling Fellowship, Houston went on to study at the University of Madrid, where he received a Doctor of Civil Law degree. In 1924, he returned to the U.S. and joined his father in private practice.

Houston’s Harvard mentors convinced him of the need “to develop a cadre of competent black lawyers to fight for the rights of black Americans.”¹⁰ The next phase of Houston’s evolving master plan was the transformation of legal education at Howard University School of Law, which would become the training ground for a group of black civil rights attorneys who, in turn, would become the leaders of succeeding generations of “social engineers.” Houston joined the faculty of Howard University School of Law in 1924, while in private practice with his father. The law school offered only an evening program to accommodate its working students. While Howard’s law school

had established a proud tradition of educating black lawyers, “its reputation and very survival were endangered by its unaccredited status.”¹¹ During that time, Houston prepared a series of reports reviewing “The Status and Activities of Negro Lawyers in the United States,” “Negro Law Schools,” and “The Negro and His Contact with the Administration of the Law.”¹²

In May 1929, Houston issued yet another report discussing “The Status of Legal Education at Howard, the Objectives of the School, the Curriculum, and the Legal Instruction Methods.”¹³ Envisioning a future role for Howard’s law school, Houston argued “that institutional racism could be effectively challenged through litigation and that to accomplish this end, a group of well-trained lawyers would be needed to file the civil actions which would eventually secure for Black citizens the Constitution’s promise of Equal Protection of the law.”¹⁴

The obvious choice, Charles Houston accepted an appointment as Vice Dean of Howard University Law School in June 1929 and took the first of several leaves of absence from Houston & Houston. As Vice Dean, he “began almost immediately to upgrade the quality of instruction provided at the Law School. Admission standards were raised, personnel changes were undertaken, and significant improvements were made to the law library.”¹⁵ There were strenuous objections to these reforms by both law school alumni and students—especially to the closure of the evening program. Houston was accused of attempting to “Harvardize” Howard.¹⁶ Nevertheless, the law school went on to become accredited by both the American Bar Association and American Association of Law Schools in 1931.

In a 1935 article “The Need for Negro Lawyers,”¹⁷ Houston pointed out “that the average white lawyer, especially in the South, cannot be relied upon to wage an uncompromising fight for equal rights for Negroes,” essentially because he had conflicts of interests and benefitted from the “very exploitation of the Negro he would be called upon to attack and destroy.”¹⁸ It was equally clear, however, that there was a dearth of black attorneys with courtroom, judicial, or even governmental experience:

It is no accident that there are not more Negro lawyers in states like Alabama, Georgia, Mississippi and Louisiana. The medium through which a lawyer does the bulk of his work is government. Lawyers more than any other class operate the machinery of government. The majority of the country’s executives, its legislators and all the judges of its courts of record have been lawyers. A lawyer, whether in private practice or public office, is part of the machinery of government and by virtue of his admission to the bar he becomes an officer of the court. It would follow that in those communities where sentiment and tradition are strongest against the Negro taking part in governmental activity, one would expect to find the greatest scarcity of Negro lawyers.¹⁹

Even so, “it is where the pressure is greatest and racial antagonisms most acute that the services of the Negro lawyer as social engineer are most needed,” Houston concluded.²⁰

Both north and south, the bench and bar were contemptuous of black attorneys, their training, and their skills as advocates. While a number of African Americans held law degrees, few were licensed to practice. Even fewer could support themselves on their earnings as practicing lawyers. The American Bar Association barred blacks from membership.²¹ Black lawyers turned to the National Bar Association²² and the National Lawyers Guild²³ for professional support and alliance. Not even a Justice of the U.S. Supreme Court was above racist slights. Notoriously racist and anti-Semitic James McReynolds²⁴ turned his back to Houston as he presented his arguments to the Court in *Missouri Ex rel. Gaines v. Canada*.²⁵

Despite an exceedingly hostile and often life-threatening environment, Houston wrote, “if a Negro law school is to make its full contribution to the social system it must train its students and send them into just such situations.”²⁶ It also meant a “difference in emphasis” in their legal course of study, with greater attention “on subjects having direct application to the economic, political, and social problems of the Negro.”²⁷ Houston’s legendary demands on that first group of soon-to-be civil rights lawyers “went beyond a mere desire to train competent professionals.”²⁸ Both he and his Howard law school colleagues were training “a generation of lawyers to engage in the most significant legal and social revolution of the twentieth century.”²⁹

Houston formally stepped down as Vice Dean of the law school in June 1935, when he moved to New York to serve as special counsel to the NAACP. In October 1936, Thurgood Marshall joined him as assistant special counsel. Supported by a capable corps of civil rights attorneys—including Howard law graduates Oliver Hill, Spottswood Robinson III, and Robert L. Carter—Houston and Marshall were now positioned to fully implement Houston’s carefully conceived legal strategy to overturn *Plessy* and kill Jim Crow.

They had already begun the assault with their successful challenge to segregated higher education at the University of Maryland School of Law. In *Pearson v. Murray*,³⁰ the Maryland Court of Appeals held that providing out-of-state scholarships for blacks was not an adequate substitute for providing “separate but equal” educational opportunity within the state. In the absence of a comparable law school for blacks within Maryland, the state appellate court ordered Murray’s admission to the University of Maryland School of Law. Decided in 1936, *Pearson* served as both model and persuasive authority for the U.S. Supreme Court’s 1938 decision in *Missouri Ex rel Gaines v. Canada*,³¹ striking down a similar out-of-state scholarship program for blacks

in Missouri. With *Gaines*, however, Houston established binding national precedent. His legal stratagem of making “separate but equal” too expensive to maintain was now firmly rooted in constitutional law.

In May 1939, Houston stepped down as NAACP special counsel and had Thurgood Marshall appointed as his successor. In 1940, the NAACP Legal Defense & Educational Fund, Inc. (LDF) was established in order to receive tax-deductible contributions to support its litigation program.³² Marshall was its first director counsel; Houston continued to serve as special advisor and strategist to Marshall and LDF. In two important follow-ups to *Gaines*, Houston protégés Thurgood Marshall and Robert L. Carter persuaded the Supreme Court that not only did “separate but equal” require economic parity between white and black schools, but qualitative parity as well.

In *McLaurin v. Oklahoma*,³³ the Court held that black students admitted to previously all-white universities could not be segregated from the rest of the student body in classrooms, libraries, and other facilities, because the interaction among students is a vital component of the educational experience. As the Court noted:

There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar. The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant of the opportunity to secure acceptance by his fellow students on his own merits.³⁴

In *Sweatt v. Painter*,³⁵ despite the belated opening of a law school at all-black Texas State University, the Supreme Court said it could not “find substantial equality in the educational opportunities offered white and Negro law students by the State.”³⁶ The Court said:

In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.³⁷

Conversely, as the Court further explained:

The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the

Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.³⁸

The Court's focus on the intangible and qualitative measures of "separate but equal" in *McLaurin* and *Sweatt* were at the heart of its declaration four years later that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."³⁹

Unfortunately, Charles Hamilton Houston would not live to witness these signature achievements of his strategy to kill Jim Crow. Feeling unusually fatigued, Houston wrote a letter to LDF first assistant counsel Robert Carter in August 1949: "These education cases are now tight sufficiently so that anyone familiar with the course of the decisions should be able to guide the cases through. You and Thurgood can proceed without any fear of crossing any plans I might have."⁴⁰ Shortly thereafter, he suffered a heart attack from which he never fully recovered. Continuing the strenuous work of his law practice against the advice of doctors, Houston was hospitalized a second time and died on April 22, 1950.

On May 17, 1954, the Supreme Court handed down the decision that Charles Houston had begun fighting for 20 years earlier. . . . Despite the violence and intimidation, there were by now dozens of able civil rights lawyers carrying on the work of Charles Houston. . . . Each night on television, the civil rights movement educated all of America about the meaning of the Constitution. The whole country had finally become Charles Houston's classroom. . . . One by one the barriers set up by *Plessy* and Jim Crow crumbled.⁴¹

Although Houston served on President Roosevelt's Fair Employment Practices Committee, he had no interest in either elective office or a judicial appointment.⁴² In his view, government and the courts were parts of the problem.⁴³ He believed he could be a more effective advocate for change from the outside⁴⁴—as indeed he was. In the era of "separate but equal," Houston successfully argued six out of seven cases before the U.S. Supreme Court on behalf of African Americans.⁴⁵ Justice William O. Douglas expressed the belief that Houston was one of the ten best advocates to appear before the Court during his time on the bench.⁴⁶

In 1949, Houston said that "the Negro shall not be content simply with demanding an equal share in the existing system. It seems to me that his historical challenge is to make sure that the system which shall survive in the United States of America shall be a system which guarantees justice and freedom for everyone."⁴⁷ Charles Hamilton Houston triggered an ongoing chain reaction which to this day employs litigation—in concert with mass movement and legislative advocacy—as a tool of social, political, and legal reform.

NOTES

1. Plessy v. Ferguson, 163 U.S. 537 (1896).
2. RAWN JAMES, JR., ROOT AND BRANCH: CHARLES HAMILTON HOUSTON, THURGOOD MARSHALL, AND THE STRUGGLE TO END SEGREGATION (2010), at 18.
3. William H. Hastie, *Forward to* GERALDINE R. SEGAL, IN ANY FIGHT SOME FALL, (1975), at 5.
4. See GENNA RAE MCNEIL, GROUNDWORK—CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983), at 36.
5. Hastie, *supra*, note 3, at 6.
6. *Id.*
7. MCNEIL, *supra* note 4, at 44.
8. Transcript of the video-recording, THE ROAD TO BROWN, California Newsreel (1990), available at <<http://newsreel.org/transcripts/roadtob.htm>>.
9. MCNEIL, *supra* note 4, at 48.
10. MICHAEL K. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 53 (1994), as quoted in Roger A. Fairfax, Jr., *Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 4 HARV. BLACKLETTER L.J. 17, 21 (1998).
11. Harriet Jackson Scarupa, *The Howard School of Law, 125 Years of Changing Lives and the Nation*, NBA NAT'L B.A. MAG., (Nov/Dec., 1994), reprinted from HOWARD U. MAG. (Fall 1994). As Professor J. Clay Smith explains:
 By the early 1920s, a move was made by the "academic lawyers" to increase the standards for admission into law schools. The ABA moved to close several urban freestanding law schools, which were attended by minorities in significant numbers. The academic lawyers "stressed the need to rid society of the night schools to ensure competent public-spirited and ethical lawyers." . . . Some of the ABA's influential members were blunt about their aims: "The legal profession was a means by which Jews, immigrants, and city-dwellers might undermine the American way of life." Black law schools fell victim to the ABA's new policies.
 J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944 (1993), at 42.
12. Leland Ware, *A Difference in Emphasis: Charles Houston's Transformation of Legal Education*, 32 HOWARD L.J. 479, 481 (1989).
13. *Id.*, referencing "Personal Observations on the Summary of Studies in Legal Education as applied to Howard University School of Law," by Charles Hamilton Houston.
14. *Id.*
15. *Id.*, at 482.
16. *Id.*, at 481-483. See also, James, *supra* note 2, at 32-33.
17. Charles Houston, *The Need for Negro Lawyers*, 4 J. NEGRO EDUC. 49 (1935).
18. *Id.*
19. *Id.*, at 51.
20. *Id.*
21. See J. CLAY SMITH, *supra* note 11, at 546:
 Exclusion from the ABA robbed black lawyers of professional development, for they were not privy to the inside legal and political information disseminated and shared

by ABA members of its gatherings; they were denied a forum within which to make critical contacts with white ABA lawyers in other states, and thus could not begin to develop interstate law practices. Finally, since blacks were also excluded from the social clubs to which the judges belonged and because they lived in segregated communities, they were unable to make contact with judges and courthouse personnel outside of the courthouse itself.

22. *Id.*, at 555. The National Bar Association was organized by black lawyers in 1925, as the successor to the National Negro Bar Association, which was formed in 1909.
23. *Id.*, at 550 (“The National Lawyers’ Guild (NLG) was founded in 1937 [and] was considered a liberal lawyers’ group because it accepted members without regard to race. . . . [According to] NLG’s chairman, Frank P. Walsh, ‘One of the reasons for the formation of the new bar organization was the fact that Negroes were excluded from the American Bar Association.’”). See also NLG, *Letter to the National Association for the Advancement of Colored People*, 2 LAW. GUILD REV. 31 (1942):

[O]ne of the several fundamental considerations which led to the establishment of a National Lawyers Guild was the desire to form a national organization of lawyers devoted to the principle of non-discrimination. . . . We are therefore very proud of the fact that the most distinguished Negro members of the Bar in the United States are active and leading members of our organization. They include such outstanding American lawyers as Judge William H. Hastie, Earl Dickerson, Charles Houston, Thurgood Marshall, Euclid L. Taylor and many others.

The Guild’s by-laws were drawn up by a committee of three legal educators, including Felix Cohen, Alexander Frey, and Charles Houston. See 38 GUILD PRAC. 87 (1981).

24. See JAMES, *supra* note 2, at 116.
25. *Id.* The incident was witnessed by federal judge Robert L. Carter, then a law student at Howard:

One scene from that day I will never forget: that of Houston rising to go to the podium to begin his presentation and of Justice McReynolds, who was sitting to the left of Chief Justice Charles Evans Hughes, simultaneously spinning his chair around so that his back was to Houston throughout the argument. It is a comment on the times that there was no stir in the courtroom at this deliberate insult and no comment about it among ourselves afterward. Seemingly, no one who witnessed the incident regarded it with distaste or outrage. Thus, this deliberate showing of bias toward blacks by a member of an institution responsible for serving the interests of all Americans, if not commonplace at the time, was not unexpected. That incident provides a clear picture of the climate in which Houston conceived and began to effectuate his plan to transform American race relations.

Robert L. Carter, *In Tribute: Charles Hamilton Houston*, 111 HARV. L. REV. 2149 (1997-1998).

26. *Id.*, at 52.
27. *Id.*
28. Ware, *supra* note 12, at 485.
29. *Id.*
30. 169 Md 478 (1936).
31. 305 U.S. 337 (1938). In *Gaines*, Chief Justice Hughes wrote for the Court: “It is manifest that this discrimination . . . would constitute a denial of equal protection. That was the conclusion of the Court of Appeals of Maryland in circumstances

- substantially similar in that aspect. *University of Maryland v. Murray*, 169 Md. 478; 182 A. 590.”
32. JAMES, *supra* note 2, at 155.
 33. 339 U.S. 637 (1950).
 34. *Id.*, 641-642.
 35. 339 U.S. 629 (1950).
 36. *Id.*, at 633
 37. *Id.*, 633-634 (emphasis added).
 38. *Id.*
 39. *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).
 40. *See MCNEIL, supra* note 4, at 200.
 41. Transcript, *THE ROAD TO BROWN, supra* note 8.
 42. *See SEGAL, supra* note 3, at 70; *see also Fairfax, supra* note 10, at 23 and JAMES, *supra* note 2, at 186-187.
 43. Speaking at the 1948 National Lawyers Guild convention Houston gave a detailed account of discrimination against African Americans “not only by the Southern States, but by the policy of the federal government and other State governments in housing, education, health, the armed forces and elsewhere.” 9 *Law. Guild Rev.* 80 (1949).
 44. In a letter to his father, dated April 14, 1938, Houston wrote: “I have had the feeling all along that I am much more of an outside man than an inside man; that I usually break down under too much routine. . . . I will grow much faster and be of much more service if I keep free to hit and fight wherever circumstances call for action.” *See Richard Kluger, Simple Justice* (1975), at 205.
 45. *Hollins v. Oklahoma*, 295 U.S. 394 (1935); *Hale v. Kentucky*, 303 U.S. 613 (1938); *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944); *Fisher v. United States*, 328 U.S. 463 (1946); and *Hurd v. Hodge*, 334 U.S. 24 (1948). He was also counsel in *Nixon v. Condon*, 286 U.S. 73 (1932), one of the “white primary” cases.
 46. *See J. Clay Smith, Jr., In Tribute: Charles Hamilton Houston*, 111 *HARV. L. REV.* 2174 at note 3 (1997-1998).
 47. *See Transcript, The Road to Brown, supra* note 8.



Aaron David Frishberg

CAROL WEISS KING

Before there was a National Lawyers Guild, there was the International Juridical Association and its United States branch. Even earlier, though not composed solely of lawyers, had come International Labor Defense. And, of course, even earlier, there was the American Civil Liberties Union.



In the thick of all these groups was Carol Weiss King, who began practicing law in New York at the time of the Palmer raids, a few years after World War I, in which thousands of suspected radicals were rounded up, with the foreign-born subject to deportation. Carol King felt drawn to the defense of the victims of Attorney General Mitchell Palmer's wrath, and quickly became engaged in the effort to free these victims of repression. There were no courtroom victories in this battle, but when the new acting Secretary of Labor took jurisdiction from the Attorney General, he inaugurated new standards of due process and the setting of bail. King fought this legal battle from an office shared with four law partners, all male, all men of the left.

By 1924, King was helping to edit the ACLU's Law and Freedom Bulletin, which documented and analyzed how constitutional rights were being treated at the local court level. When Walter Nelles became a law school professor, she became the sole editor. When King and her law partner, Isaac Shorr, won an unprecedented habeas writ to bar a pending immigration proceeding, the lawyers who subscribed to Law and Freedom Bulletin could cite to it by Immigration Bureau docket number and date.

In December 1927, King's photo would appear in the International Labor Defense's Labor Defender alongside that of Clarence Darrow, as the ILD celebrated the acquittal of two radical Italian-American workers, Donato Carillo and Calogero Greco, who were falsely charged with murder. It was Darrow's trial. But King and Shorr, by recruiting and working with Dar-

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row, contributed to the Carillo-Greco case not becoming another successful frameup in the mode of Sacco and Vanzetti.

Carol King first learned of the International Juridical Association while on holiday in Moscow in 1931 and met with its leaders in Germany, France, and Austria, including its international secretary in Berlin. Upon her return home, she began to organize the American section to work on labor and civil rights law. Within a few months, she had signed up forty-nine members from twenty states, and formed an executive committee including Osmond K. Fraenkel of the ACLU, Joe Brodsky of the ILD, and Roy Wilkins of the NAACP. One other woman, Yetta Land, a Cleveland labor lawyer, sat on the committee.

Carol King was the moving force behind the *IJA Bulletin*, which published its first issue on May Day, 1932. It carried news of the Scottsboro case, the struggle of Kentucky coal miners, criminal syndicalism cases in Ohio and Oregon, notes on a lynching in Maryland, white primaries in the South, an article on the new Norris-LaGuardia Anti-Injunction Act, and the obituary of Elmer S. Smith, who had defended Wobblies in Washington state and been disbarred for his efforts.

Charles Hamilton Houston, Thurgood Marshall's mentor, joined the executive committee of the IJA in 1935. He wrote to members of the National Bar Association that the *IJA Bulletin* was the one source of accurate accounts of Negro cases and urged them to subscribe.

We tend to take for granted today that the states are bound by the guarantees in the bill of rights. But it was not so in the early 1930s. In *Gitlow v. New York*, a case in which King and her colleagues represented a Communist charged with criminal anarchy, the U.S. Supreme Court, while upholding the conviction, accepted for the first time the argument that the First Amendment was binding on the states. King was also part of the litigation team which reinforced this doctrinal victory, this time winning a new trial for Haywood Patterson, one of the *Scottsboro* defendants. In the *Scottsboro* case the U.S. Supreme Court held that the rush to trial in the Alabama state court had deprived the defendants of their right to counsel, and thus of due process of law.

King, as a representative of the IJA, was one of the participants at a small gathering, along with lawyers from the Lawyers Security League, an organization of unemployed lawyers, and lawyers associated with the battles of the International Labor Defense, the Communist Party, and the American Committee for the Protection of the Foreign Born. Also among the participants was Abe Isserman, who had recruited King to work with him in defending the rights of Jehovah's Witnesses and who would later lose his license to practice law for his vigorous defense of the leadership of the Communist Party. This gathering initiated the founding of the National Lawyers Guild.

At the founding convention, law professors Felix Cohen, Charles Hamilton Houston, and Alexander Frey were charged with drawing up the by-laws of the new organization.

King would report in the *IJA Bulletin* the preamble to the Guild's constitution, echoing the rationale enunciated for the auto workers sit-down strike in Detroit:

The National Lawyers Guild aims to unite the lawyers of America in a professional organization which shall function as the effective social force in the service of the people to the end that human rights shall be more sacred than property rights.

King's own practice had focused on the virtually lawless area of immigration, in which the arbitrary decisions of immigration officers led to the deportation of foreign-born Americans, whose political views were held against them. In an era in which there were no official publications of administrative decisions, such as those of immigration hearings, King reported the rulings in her own and others' immigration cases in the *IJA Bulletin*, providing the only record which allowed them to be cited as precedents.

On rare occasions, she was able to get the United States District Court, or the U.S. Court of Appeals, to take cognizance of an administrative decision, leading the U.S. Department of Justice or, later, the Department of Labor, to beat a hasty retreat, withdrawing a deportation order to avoid a precedent-setting ruling.

King's expertise in immigration matters became known among the left-wing lawyers of her day, along with her willingness to share advice freely, a trait Guild members share to this day.

When California longshoremen struck in 1934, the Governor sent in the National Guard to protect strikebreakers. The longshoremen, led by Australian-born Harry Bridges, responded by organizing a successful general strike. The longshoremen won, but the U.S. Department of Labor, at the urging of the Governor of California, set its sights on Bridges, moving to deport him and charging him with being a member of the Communist Party. Bridges turned to Carol King for assistance, and she traveled to California to join the defense.

With the victory of the longshore strike, Bridges' prominence in the west coast labor movement grew. Needing the support of the labor movement in 1940, but under pressure from the right to deport Bridges, the Roosevelt administration chose a middle ground. The Secretary of Labor issued a warrant for Bridges' arrest, but appointed a special officer, the Dean of Harvard Law School, to preside impartially at the hearing, a departure from the usual judge-prosecutor.

King delivered the opening statement for the defense, which she had prepared in part before leaving New York. She explained that the judge should hear it so he could rule on the admissibility of defense questions of prosecution witnesses. She told the judge that the defense would prove that a conspiracy existed against Bridges because of his role in the labor movement. Naming names, she accused those in and close to government of engaging in blackmail and suborning perjury to make their case against Bridges. She said that the defense would prove that Bridges had never been a member of the Communist Party.

The Bridges trial ended and she returned to New York and wrote the defense brief. As a solo practitioner, she had lost money during her months in California. But when the Secretary of Labor published the hearing findings, the political and legal victory was complete. Not only had the Harvard dean found that prosecution witnesses' claims that Bridges had been a CP member were fabricated, he endorsed the defense claim of a political conspiracy against Bridges. Because of his holding on CP membership, the decision did not reach the question of whether the CP endorsed the violent overthrow of the government.

Bridges, for his part, was quoted in the San Francisco News, espousing frankly his anti-capitalist views at the hearing. Bridges had said, "Sometimes I get a little irritated when my views are ascribed to the Communist Party, because I had them before the Communist Party came into being."

In a precursor of the 1950s McCarthy era, King was summoned to Washington, DC to testify before the House Un-American Activities Committee, chaired by Martin Dies, as it attempted to smear the IJA by linking it to King's office mate and former law partner, Joe Brodsky, who represented the Communist Party before the Committee. In turn, the Committee sought to discredit the National Labor Relations Board for its citation of the *IJA Bulletin* in an NLRB statement advocating changes to the National Labor Relations Act. Moreover, one committee member noted, the IJA had worked with the CIO on labor issues.

King stood her ground, pointing out that since the IJA's purposes included providing legal research on labor and civil liberties issues, it made sense for Brodsky to be on its executive board, along with ACLU attorney Osmond Fraenkel. The NLRB references to *IJA Bulletin* articles had actually been footnote citations, she noted. She made a point of putting it on the record that the IJA worked with the more conservative AFL as well as the CIO.

Early in 1940, the FBI arrested eleven people in Detroit, including members of the Workers Alliance, leaders of the International Labor Defense, CP members, and veterans of the Spanish civil war. They were charged with

violations of the Neutrality Act for their support of Republican Spain. King wrote to lawyers she knew around the country, including such members of the NLG as Maurice Sugar and John Coughlin, urging them to use their organizations to press the Department of Justice to drop the proceedings, correctly gauging that “just a little more pressure should be able to put a finish to this mistake.” In fact, the head of the U.S. Department of Justice Criminal Defense Division said the whole incident was under review, and the same day, the new Attorney General, Robert Jackson, ordered the indictments dismissed.

That was not the end of the matter for King. In the *IJA Bulletin*, she called for an investigation of the FBI for making the arrests and for preventing contact between the arrestees and their counsel. King’s first lawyer employer, Max Lowenthal, arranged a meeting between Ernest Goodman, who had represented the defendants, and Sen. George Norris. Norris wrote to Attorney General Jackson, requesting an investigation. Jackson appointed a special assistant, Henry Schweinauer, to look into the matter. Schweinauer reported that FBI headquarters in Washington had approved plans for keeping the arrestees from their lawyers. Jackson nonetheless wrote a letter to Norris praising the FBI’s purpose “to observe the rights of defendants” which Senator Norris denounced on the Senate floor as a whitewash.

At the March 1940 conference of the American Committee for the Protection of the Foreign Born, the chair of the Immigration and Naturalization Service’s Board of Review spoke of the INS’s need to institute reforms to provide due process to aliens. King, speaking on behalf of the IJA, agreed that the Department of Labor had recently been cooperative in seeking to give the alien a fair deal, but warned against letting the Department go unwatched.

In Congress, a bill was introduced which explicitly authorized the Secretary of Labor to deport Harry Bridges to Australia. The IJA immediately submitted a brief showing that the bill was unconstitutional. Although denounced by the Attorney General as a bill of attainder, the bill passed the House of Representatives, 330–42. King rushed to develop opposition to the bill in the national press and among key senators, and the bill died in the Senate.

In 1940, too, Congress passed the Alien Registration Act, despite opposition by the International Labor Defense and the IJA, pointing to repressive measures applicable to citizens and aliens alike. President Roosevelt vetoed the bill, but Congress passed it over his veto.

That same year, liberal New Deal lawyers proposed a resolution to the National Lawyers Guild convention equating Nazi Germany and the Soviet Union. After the Guild voted down the resolutions, its new president, Robert Kenny, walked into its Washington office to find a mountain of telegrams of resignation.

Returning to his hotel room, he received a call from a lawyer representing the top members of the Roosevelt administration who were NLG members: Robert Jackson, Attorney General; Jerome Frank, General Counsel for the Agriculture Adjustment Administration; and Adolph A. Berle, at the State Department. At first, they proposed resigning from the DC chapter and remaining at large members, because they did not have time to deal with D.C. chapter problems, including perceived “communist infiltration.” Kenny agreed to this, but then received a second call. Now the proposal was that certain members of the Guild’s national executive board who were too far left resign. This Kenny rejected, saying, “We could never do anything like that.”

At the same time that the Guild was losing liberal members, King lost political and legal allies who wanted to distance themselves from her left politics. But King persisted in reaching across the political spectrum to have the best chance of winning legal battles. When the Department of Justice sought to deport William Schneiderman because he had not volunteered on his citizenship application his CP membership, King recruited Roosevelt’s Republican presidential opponent, Wendell Wilkie, to argue the First Amendment issues before the United States Supreme Court.

Late in 1942, the editors of the National Lawyers Guild quarterly law review proposed to the *IJA Bulletin* that the two merge, with the combined publication being published six times a year, and the entire *IJA Bulletin* Board joining the Guild’s Board. Carol King was to continue to write her “Recent Items” in the new combined journal, which would be issued six times a year.

King’s professional life began with the Palmer raids. Her life ended in 1952 as McCarthyism was on the rise and she remained in the thick of the fight. For three decades, she and the Guild fought for the rights of radicals and Communists. Her contributions to immigration law are now recalled annually by the NLG, with the Carol Weiss King award given for achieving excellence in pursuing creative and socially conscious approaches to advocacy in the immigration law field. It is a modest, but most appropriate, recognition of her life and work.

This article barely scratches the surface of Carol King’s remarkable life. For real inspiration, read *Carol Weiss King: Human Rights Lawyer, 1895-1952*, by Ann Fagan Ginger. It is that remarkable book about that remarkable woman that is the source for this brief article.



editors' preface

Continued from inside front cover

the gender make-up of the Guild changed, and only in the past decade have we been able to overcome our still-too-monochrome whiteness.

We invite our readers to submit profiles of other founders for upcoming issues. The inverse of Santayana's admonition that one who does not remember the past is doomed to repeat it applies. If we forget our proud legacy, we risk not living up to it.

—David Gespass, President, National Lawyers Guild

Nathan Goetting, Editor-in-Chief, *National Lawyers Guild Review*



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