The Fire Last Time

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INTRODUCTION

Labor is on the march. New unions — at Starbucks, Amazon, videogame producers, and other previously unorganizable sectors — are organizing. Unions founded in the labor upsurge of the 1930s — from the United Auto Workers to the Hollywood guilds — are more focused on organizing, including in the South, and more committed to rank-and-file empowerment and to challenging economic inequality than they have been in decades.[1] Workers are organizing in multiracial,

[*] Copyright © 2024 Catherine L. Fisk. Barbara Nachtrieb Armstrong Distinguished Professor, University of California, Berkeley Law. The essay title is an obvious riff on the title of James Baldwin's brilliant and influential 1963 book of essays about racism, *The Fire Next Time*. Baldwin used a line from a Black spiritual, "God gave Noah the rainbow sign / No more water, the fire next time," to illuminate for white readers the anger and suffering that sparked the direct action phase of the civil rights movement in the early 1960s. Its use here is to suggest that the major labor upsurge of the 1930s was met by ferocious political and legal repression from which today's labor movement is only now recovering.

[1] The new reformist UAW leadership began its negotiations with the Big Three automakers in summer 2023 with meetings and handshakes with local factory workers

multiethnic unions that advocate for race and gender justice.[2] In the "Hot Labor Summer" of 2023, celebrity actors and writers, trailed by paparazzi, joined picket lines with minimum wage immigrant hotel workers in Los Angeles, and celebrity-watching magazines reported both the acts of solidarity and what stars wore on the picket line.[3] Although there is still a *very* long way to go before workers gain the institutional power they had in 1950, when a third of the labor force, covering most of the major industries, had collective bargaining agreements,[4] it appears possible that this is the upsurge that labor activists have been working for, and labor scholars have been hoping for,[5] since the New Deal order collapsed in the 1970s.[6]

rather than the symbolic handshake with CEOs. Neal E. Boudette, *Autoworkers Open Contract Talks in a Fighting Mood*, N.Y. TIMES (July 14, 2023), https://www.nytimes.com/2023/07/14/business/uaw-contract-talks.html [https://perma.cc/4J94-3HJB]. The Teamsters threatened a strike against UPS but settled without it, dramatically cutting the two-tier wage structure of a prior contract; 2-tier wage structures had been a favored labor cost-cutting strategy for companies since the 1980s, but unions insist they undermine solidarity. Noam Scheiber, *UPS Reaches Tentative Deal with Teamsters to Head Off Strike*, N.Y. TIMES (July 25, 2023), https://www.nytimes.com/2023/07/25/business/economy/ups-teamsters-contract-strike.html [https://perma.cc/4W27-TG3P].

[2] To take just one example, both the leadership and the various campaigns featured on the website of the SEIU, the nation's second largest union, almost all feature workers of diverse races. *About SEIU*, SEIU, SEIU.org/about (last visited Feb. 12, 2024) [https://perma.cc/SGH6-UXXH]. *See generally* SHARON KURTZ, WORKPLACE JUSTICE: ORGANIZING MULTI-IDENTITY MOVEMENTS, at xi-xx (2002) (describing union organizing campaigns of clerical workers that built on the diverse racial and gender identities of the workers and focused on issues of race, gender, and wage justice).

[3] Averi Baudler, *We Support the Strike and Jeremy Allen White's Biceps at the Strike*, INSTYLE (July 21, 2023, 5:50 PM), https://www.instyle.com/jeremy-allen-white-sag-aftra-strike-picket-line-7564062 [https://perma.cc/GW6C-FRSJ].

[4] A readable and brief synthesis of the leading data on union density is PAUL D. ROMERO & JULIE M. WHITTAKER, CONG. RSCH. SERV., R47596, A BRIEF EXAMINATION OF UNION MEMBERSHIP DATA 4 (2023), https://crsreports.congress.gov/product/pdf/R/R47596 [https://perma.cc/TCF4-DBKC]. CRS reports that union density reached its post-World War II peak of 33.5% in 1954. *Id.* at 1.

[5] *See generally* DAN CLAWSON, THE NEXT UPSURGE: LABOR AND THE NEW SOCIAL MOVEMENTS 196-97 (2003) (exploring the possibility of a new upsurge in labor activism).

[6] *See generally* THE RISE AND FALL OF THE NEW DEAL ORDER, 1930–1980, at ix-x (Steve Fraser & Gary Gerstle eds., 1989) (pulling a collection of essays that reflect the life of the New Deal which began in 1930 and was "dead" by 1980); JEFFERSON COWIE, STAYIN' ALIVE: THE 1970S AND THE LAST DAYS OF THE WORKING CLASS 236-41 (2010) (exploring the

As we contemplate the new labor upsurge, and the role law and movement lawyers can play in it, it is worth recalling what labor law and a group of union lawyers (who today would describe themselves as movement lawyers) did during the last upsurge. Many scholars (myself included) have shown that Taft-Hartley prohibited many of the organizing and protest tactics that labor had used to build worker power in the 1930s and required unions — under penalty of losing access to enforcement of legal rights — to oust any local or national leader who refused to swear an affidavit of non-communist affiliation.[7] Union lawyers suddenly faced the difficult job of policing client activism and advising on the ouster of communists. For the radical lawyers who went into labor law because they shared the labor movement's goals of economic and political transformation, being the fulcrum of the government's efforts to deradicalize labor presented constant dilemmas. There are many studies of the pitfalls of *legalism*;[8] the *taming*,[9] *channeling*,[10] and *deradicalization* of labor unions and labor law;[11] the failure of progressive lawyers to be movement lawyers,[12] and the failure of unions to organize people of color, immigrants, and women;[13] and the many other disappointments and crushed hopes of the twentieth-

nature of working class political and cultural militancy and despair as neoliberalism supplanted the New Deal version of social democracy).

[7] Catherine L. Fisk & Diana S. Reddy, *Protection by Law, Repression by Law: Bringing Labor Back Into the Study of Law and Social Movements*, 70 EMORY L.J. 63, 98-122 (2020) (describing the effect of Taft-Hartley on the ILWU through the prism of one case).

[8] On legalism, often described as undue reliance on the National Labor Relations Act and collective bargaining rather than movement activism, see CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS 147, 154 (1985); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1577-79 (1981).

[9] LAURA WEINRIB, THE TAMING OF FREE SPEECH 270-72 (2016).

[10] Fisk & Reddy, *supra* note 7, at 122-28 (arguing that law and lawyers channeled labor unions and movement activism into certain kinds of actions).

[11] Karl E. Klare, *The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265, 265-67 (1978).

[12] Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 825-29, 882-83 (2021).

[13] *E.g.*, PAUL FRYMER, BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY 15, 22-23, 65-66 (2008).

century labor movement.[14] There is also a corresponding wealth of calls for today's lawyers of the progressive Left to be "rebellious,"[15] "client-centered,"[16] "collaborative,"[17] "catalytic,"[18] "democratic,"[19] and movement-centered,[20] and to eschew mere legal reform in favor of "non-reformist reforms."[21] Yet, however exhaustive the chronicling and dissection of the despair of the Sixties' New Left over the failures of the Thirties' Old Left, one facet deserves renewed attention: the role of the United States Department of Justice ("DOJ") in prosecuting the radical Left, including many union leaders, for seditious criminal conspiracy.

Between 1940 and 1960, the FBI, the DOJ, Congress, and many state governments doggedly sought to suppress left-labor activism by targeting union leaders, and in some instances their lawyers. Back before the GOP was proposing to defund the FBI and impeach the U.S. Attorney General for their roles in prosecuting the January 6 activists for seditious conspiracy,[22] the DOJ and the FBI prosecuted dozens of

[14] Frances Fox Piven and Richard A. Cloward credit the uprising of workers in the 1930s with the gains secured by labor and blame unions for the losses. FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 96-175 (1979). They argue that it was the fact of union organization and labor contracts that crushed the labor movement, but they overlook the role the government played in ensuring that the labor unions that survived the 1947 to 1955 period were far less radical than those that were founded between 1933 and 1938.

[15] GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 7-10 (1992).

[16] DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH, at xxi (1991).

[17] Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2140-41 (1991); Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157, 157-59 (1994).

[18] Christine Cimini & Doug Smith, *Modalities of Social Change Lawyering*, 26 LEWIS & CLARK L. REV. 1035, 1092-93 (2023).

[19] *See* Sameer Ashar, *Deep Critique and Democratic Lawyering*, 104 CALIF. L. REV. 201, 219-24 (2016).

[20] *See* Azadeh Shahshahani, *Movement Lawyering: A Case Study in the U.S. South*, 5 HOW. HUM. C.R. L. REV. 45, 45 (2020).

[21] Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2497 (2023).

[22] The DOJ reports that as of September 5, 2023, more than 1,069 people have been charged in connection with January 6, 594 have pleaded guilty to federal charges, 98 have

left-labor activists and union leaders under an earlier sedition law, the 1940 Smith Act. With a few important exceptions, to the extent that the prosecutions are remembered at all, they are thought of as targeting Communists and are examined as though what was on trial was leftist ideology.[23] What has been overlooked is that the origin and purpose of the Smith Act, and many prosecutions under it, were to crush the radical, multiracial, labor movement. To understand the relatively more conservative and quiescent labor movement of the late 1950s, it is important to recover how the Smith Act prosecutions affected activists and lawyers, both those who went to prison and those who avoided it only by distancing themselves from the Left.

This Essay tells an abbreviated version of Smith Act prosecutions of labor-left activists in New York and in Hawai'i and the crucial role that union lawyers played in their defense. My goal is to suggest that a purpose and effect of the prosecutions was to weaken multiracial labor organizing by inflicting hardships on both union leaders and union lawyers. Driving a wedge between left activists and their lawyers had enduring consequences for the labor movement.

been found guilty at trial, and approximately 335 have been sentenced to periods of incarceration. *30 Months Since the Jan. 6 Attack on the Capitol*, U.S. ATT'Y'S OFF.: D.C. https://www.justice.gov/usao-dc/32-months-jan-6-attack-capitol#:~:text=A%20total%20of%2086%20of,officer%20during%20a%20civil%20disorder (last updated Oct. 6, 2023) [https://perma.cc/F7RR-7ZM2]. Only a handful have been charged with seditious conspiracy; most have been charged with assaulting law enforcement officers, and various crimes related to unlawful entry to or destruction of government property. Charlie Savage, *How the Crime of Seditious Conspiracy Is Different From Insurrection and Treason*, N.Y. TIMES (May 25, 2023), https://www.nytimes.com/2023/05/25/us/what-is-seditious-conspiracy-insurrection-treason.html [https://perma.cc/2WDH-A9GU]. The prosecutions have increased the right-wing attack on the FBI that began when the FBI investigated criminal activity in the Trump Administration. *See* Jordain Carney, *Inside the House GOP's Plan to Go After FBI and DOJ*, POLITICO (July 5, 2023 4:30 AM EDT), https://www.politico.com/news/2023/07/05/house-gop-escalating-doj-attacks-00104475 [https://perma.cc/K7Z9-SEPD].

23 *See generally, e.g.*, MICHAL R. BELKNAP, COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES 122-146 (1977) (describing the Smith Act prosecution, *United States v. Dennis*); STANLEY I. KUTLER, THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR 152-82 (1982) (same).

I. CRIMINALIZING RADICALISM: THE ORIGINS OF SMITH ACT PROSECUTIONS

The Smith Act, enacted in June 1940 over President Roosevelt's veto, was formally known as the Alien Registration Act.[24] It required noncitizens in the United States to register with the federal government and made it a crime to teach or advocate the overthrow of the government by force or violence, or to organize or belong to a group that so advocated.[25] The statute was focused on radicalism in the labor movement and was the particular passion of the Representative Howard Smith, conservative Democrat of Virginia, who had been attacking unions and their lawyers since being elected to Congress in 1930.[26] Smith was everything the labor Left opposed: he had led the opposition to the enactment of the National Labor Relations Act ("NLRA") in 1935, and when the statute passed anyway, he got himself appointed to investigate alleged communist activities of the staff of the National Labor Relations Board.[27] He opposed all protective labor and civil rights legislation, and in the 1950s was still trying to outlaw strikes and to prevent the enactment of laws against lynching and poll taxes.[28] He worked closely with Martin Dies, conservative Democrat of Texas, who chaired a special investigative committee of the House to investigate "un-American activities."[29] Dies and Smith insisted that the NLRB was

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[24] Smith Act, Pub. L. No. 76-670, 54 Stat. 670 (1940) (repealed in part 1952). It was later declared unconstitutional in part by *Yates v. United States*, 354 U.S. 298 (1957).

[25] 54 Stat. at 671; *see* DONNA T. HAVERTY-STACKE, TROTSKYISTS ON TRIAL: FREE SPEECH AND POLITICAL PERSECUTION SINCE THE AGE OF FDR 30-42 (2015) (describing the origins and provisions of the Smith Act).

[26] BELKNAP, *supra* note 23 at 22; ANN FAGAN GINGER, CAROL WEISS KING: HUMAN RIGHTS LAWYER, 1895–1952, at 306 (1993).

[27] JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD 2-3, 151-71(1981).

[28] Fact Sheet # 1 on Smith Act 1-4, Box 5, Folder 13.1, EG-WPRL (on file with author).

[29] In 1945, the committee became the better-known permanent standing House Un-American Activities Committee ("HUAC") with a different chair. A brief overview of the history of Congressional investigations of leftists, with guidance to the documentary record, is available online. *Records of the House Committee on Un-American Activities* (*HUAC*), HIST. HUB: LEGIS. ARCHIVE (May 17, 2022), https://historyhub.history.gov/legislative-records/b/legislative-records-blog/posts/records-of-the-house-committee-on-un-american-activities-huac [https://perma.cc/F5XV-Z5HT].

linked to the Communist Party through a New York group of progressive labor and civil liberties lawyers known as the International Juridical Association ("IJA"), including its executive director, Joe Brodsky, and Brodsky's law partner, Carol Weiss King, who was the nation's leading expert on immigration law, and a labor and civil liberties lawyer.[30]

One of King's clients was the president of the west coast dock workers union, Harry Bridges, a native of Australia.[31] He was the original target of the Smith Act, though it was also aimed at "all others of similar ilk."[32] Bridges came to national prominence, and to leadership of the International Longshore and Warehouse Union ("ILWU"), during his skillful leadership of the 1934 dock workers strike, which morphed into a general strike in San Francisco after police shot and killed two strikers.[33] The government had tried to deport Bridges in 1938, but the effort failed when the trial examiner, Harvard Law School Dean James Landis, found no evidence that Bridges was a Communist.[34] The Smith Act was enacted to give the government another shot at Bridges.[35]

In August 1940, Attorney General Robert Jackson directed the FBI to investigate grounds to reopen deportation proceedings against Bridges under the new law. The FBI did so, transmitting its 2,500-page report in November. The FBI also investigated Bridges' lawyers, concluding that they too were connected with the Communist Party.[36] The government convicted Bridges under the Smith Act in 1941, but the Supreme Court

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[30] GINGER, *supra* note 26, at 306, 319.

[31] ROBERT W. CHERNY, HARRY BRIDGES: LABOR RADICAL, LABOR LEGEND 1, 104, 178 (2023).

[32] GINGER, *supra* note 26, at 319.

[33] CHERNY, *supra* note 31, at 59-133 (describing the strike and Bridges' role in leading it).

[34] *Id.* at 167-82; *see also* PETER AFRASABI, BURNING BRIDGES: AMERICA'S 20-YEAR CRUSADE TO DEPORT LABOR LEADER HARRY BRIDGES 103-05 (2016).

[35] The history of the government's four separate efforts to deport and/or incarcerate Bridges are well told in the two principal biographies of Bridges, CHERNY, *supra* note 31 and CHARLES P. LARROWE, HARRY BRIDGES: THE RISE AND FALL OF RADICAL LABOR IN THE UNITED STATES (1972). The legal maneuvers are recounted with particular attention on law and lawyers in KUTLER, *supra* note 23, at 118-51, AFRASABI, *supra* note 34, at 107-37 and GINGER, *supra* note 26, at 325-41. The facts in the text are drawn from those sources.

[36] GINGER, *supra* note 26, at 325-27 (depicting pages from the FBI dossier on King).

overturned the conviction in 1945.[37] Undaunted, the government made two more unsuccessful efforts to convict and deport Bridges — in 1949 and in 1955 — but the FBI surveillance of union leaders and their lawyers continued throughout.[38]

Apart from the prosecution of Bridges, the government's first major prosecution under the Smith Act began in the summer of 1941 when U.S. government agents raided the office of the Socialist Workers Party ("SWP") in Minneapolis and indicted twenty-nine SWP members, including fifteen members of the militant Teamsters Union Local 544.[39] Many of these men and women had been involved in organizing strikes of truck drivers in 1934 and Works Progress Administration workers in 1939. As Trotskyists and pacifists, they were considered a threat to the United States in wartime. Eighteen were convicted and, after losing on appeal in the Eighth Circuit and failing to persuade the Supreme Court to grant review, they were incarcerated in December 1943, each serving more than a year in federal prison. Even after their release and return to work and to political activism, they and other SWP members remained under intensive FBI surveillance until the 1970s.

There were a few unsuccessful Smith Act prosecutions of Nazi sympathizers during World War II, but the next successful case was against the national leadership of the Communist Party.[40] The investigation began not long after the UAW's nearly four-month strike of 320,000 workers against General Motors ended in 1946 with a significant pay increase and with the Truman Administration appointing a fact-finding commission that determined the largest company in the world could afford a significant pay increase without increasing

[37] Bridges v. Wixon, 326 U.S. 135, 156 (1945).

[38] *See* AFRASABI, *supra* note 34, at 63-227 (describing the four separate legal proceedings seeking to deport Bridges). The FBI surveillance of Bridges' lawyers is documented (complete with photo reproductions of FBI files) in COLIN WARK & JOHN F. GALLIHER, PROGRESSIVE LAWYERS UNDER SIEGE: MORAL PANIC DURING THE MCCARTHY YEARS, at appendices B, C, D (2015).

[39] HAVERTY-STACKE, *supra* note 25, at 1, 70-72. All facts in this paragraph are drawn from this book.

[40] BELKNAP, *supra* note 23, at 40 (briefly describing the unsuccessful Smith Act prosecution of Nazi sympathizers).

consumer prices.[41] The business sector and the Republican Party portrayed the muscle of the unionized working class as a threat to the economy, and the radical Left as a Soviet threat to democracy.[42] And conservative southern Democrats were eager to portray the Communist Party as a threat to racial segregation and the southern way of life, as the Party and its fellow travelers were among those whites, including especially CIO unions, who were vigorously seeking to organize Blacks into multiracial unions and to challenge Jim Crow.[43] After Republicans won a majority in Congress in November 1946, for the first time since 1932, business leaders and the conservatives in the Truman Administration used the backlash against the strikes and the southern labor organizing campaign known as Operation Dixie to roll back laws protecting labor and to enact laws targeting the labor Left.[44] There were many reasons for amping up public fear of the alleged communist menace; they included some having more to do with foreign affairs and building support for the Marshall Plan than concern about labor.[45] But the Smith Act was a crucial weapon in the conservatives' attack on labor.

In 1948, the United States Attorney for the Southern District of New York indicted twelve leaders of the Communist Party.[46] Five lawyers represented the defendants; all were members of the National Lawyers Guild, the progressive national organization of lawyers that formed in the 1930s as an alternative to the reactionary and racist American Bar

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[41] JOHN BARNARD, AMERICAN VANGUARD: THE UNITED AUTO WORKERS DURING THE REUTHER YEARS, 1935–1970 215 (2004); NELSON LICHTENSTEIN, THE MOST DANGEROUS MAN IN DETROIT: WALTER REUTHER AND THE FATE OF AMERICAN LABOR 220-47 (1995) (describing the UAW-GM strike of 1946).

[42] *Id.* at 248-70 (describing the right-wing attack on unions after the 1946 election).

[43] There is a vast literature on the role of the Left in challenging white supremacy in the South (and elsewhere). On the CIO, see ROBERT H. ZIEGER, THE CIO 1935–1955, at 227-41 (1995). In-depth histories of multiracial union campaigns that fused racial justice with class and workplace justice, and the fierce opposition they encountered in the South and elsewhere, include ROBERT ROGERS KORSTAD, CIVIL RIGHTS UNIONISM: TOBACCO WORKERS AND THE STRUGGLE FOR DEMOCRACY IN THE MID-TWENTIETH-CENTURY SOUTH (2003) and BRUCE NELSON, DIVIDED WE STAND: AMERICAN WORKERS AND THE STRUGGLE FOR BLACK EQUALITY (2001).

[44] *See* sources cited *infra* notes 45–47.

[45] *See generally* JOHN LEWIS GADDIS, THE COLD WAR: A NEW HISTORY (2005) (describing the motivations of domestic repression of leftists during the Cold War).

[46] Dennis v. United States, 341 U.S. 494, 496 (1951); *see also* 18 U.S.C. § 2385.

Association.[47] All had experience in labor, civil rights, and civil liberties cases. Harry Sacher and Abraham Isserman of New York and Louis McCabe of Philadelphia had long been representing labor unions and labor activists, including those affiliated with the Communist Party. Richard Gladstein of San Francisco had been representing Harry Bridges and the International Longshore & Warehouse Union since its founding in the 1930s.[48] The fifth lawyer on the team, George Crockett, the first Black lawyer to work for the U.S. Department of Labor, had also worked for the pioneering Fair Employment Practices Commission, had been recommended for the case by his law partner, Maurice Sugar, who had been the general counsel of the UAW until he had been purged by the union's newly elected leadership in 1947.[49] Arthur Kinoy (who was quite junior but later became a celebrated civil rights lawyer) was involved as part of the team to do research and draft motions, and Sugar advised as well, although he had lost the ability to practice in federal court after his pacifism during World War I had resulted in conviction for resisting the draft.[50] Only McCabe had significant experience in criminal defense. Sacher and Gladstein had handled deportation cases, and indeed Gladstein had been asked by California Communist Party Secretary William Schneiderman to go to New York to participate in the defense

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[47] *See* LUCA FALCIOLA, UP AGAINST THE LAW: RADICAL LAWYERS AND SOCIAL MOVEMENTS, 1960S–1970S, at 25 (2022); *History*, NAT'L LAWS. GUILD, www.nlg.org/about/history (last visited Feb 22, 2024) [perma.cc/GZ73-D2NJ]; Percival Roberts Bailey, Progressive Lawyers: A History of the National Lawyers Guild, 1936-1958 (Jan. 1979) (Ph.D. dissertation, Rutgers University), https://www.proquest.com/docview/302945454/fulltextPDF/BC402B1C9E3D49FCPQ/1?%20Theses&sourcetype=Dissertations%20.

[48] Interview by Stanley Kutler with Richard Gladstein, in San Rafael, Cal. (Aug. 19, 1978) (notes on file with author) [hereinafter Gladstein Interview]. Sacher had been involved in organizing the New York Transport Workers Union and was its general counsel. *See Guide to the Transport Workers Union of America: Records of Locals*, NYU LIBRS., https://findingaids.library.nyu.edu/tamwag/wag_234/ (last visited Feb. 26, 2024) [https://perma.cc/Z5TP-22QE] (describing the history and archives of the TWU and Sacher's role in establishing and representing the union).

[49] STEVE BABSON, DAVE RIDDLE & DAVID ELSILA, THE COLOR OF LAW: ERNIE GOODMAN, DETROIT, AND THE STRUGGLE FOR LABOR AND CIVIL RIGHTS 191-95 (2010); EDWARD J. LITTLEJOHN & PETER J. HAMMER, NO EQUAL JUSTICE: THE LEGACY OF CIVIL RIGHTS ICON GEORGE W. CROCKETT, JR. 34-36 (2022).

[50] ARTHUR KINOY, RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER 77 (1983).

precisely because of his success in cross-examining the "professional witnesses" that the FBI and the government had used in the cases against Bridges.[51]

It was obviously a political trial — the government had no evidence that any of the defendants or the Communist Party had tried to overthrow the government or intended to do so.[52] Rather, the offense was that they conspired to organize the Communist Party, and the Party (as evidenced by the writings of Marx, Lenin, and Stalin) advocated the overthrow of the government.[53] The government's proof and trial strategy treated the case as a highly publicized attack on communism. Days were filled by former communists, FBI agents and informants, and labor spies discussing the tenets of communism and the government's lawyers reading Marx and Lenin into the record. Given the government's strategy, the defendants responded by defending the ideas that the government had put on trial. Indeed, Dennis decided to represent himself after the jury was impaneled precisely to remain free to make political arguments that might be deemed unseemly for a lawyer.

Judge Harold Medina, a brilliant but combative, sarcastic, and egotistical man who was new to the bench, quickly gave the impression of bias because he relied on the more experienced U.S. Attorney for guidance in managing the courtroom.[54] As the trial dragged on, Judge

[51] Gladstein Interview, *supra* note 48, at 2; *see generally*, COLIN WARK & JOHN F. GALLIHER, PROGRESSIVE LAWYERS UNDER SIEGE: MORAL PANIC DURING THE MCCARTHY YEARS (2015).

[52] Dennis v. United States, 341 U.S. 494, 497-98 (1951) (noting "[w]hether on this record petitioners did in fact advocate the overthrow of the Government by force and violence is not before us" but "the literature of the Party and the statements and activities of its leaders, petitioners here, advocate, and the general goal of the Party, was, during the period in question, to achieve a successful overthrow of the existing order by force and violence"); BELKNAP, *supra* note 23, at 82-83 (explaining that the *Dennis* prosecution's evidence and theory of the case focused on the writings of Marx and Lenin and, "[a]s for proof that Communist theory was about to translate itself into revolutionary action, the U.S. attorney would not offer any — because he had none").

[53] *Dennis*, 341 U.S. at 510-11 (stating that the "formation by petitioners of such a highly organized conspiracy . . . coupled with the inflammable nature of world conditions" established a sufficient danger to warrant criminal conviction for a conspiracy to advocate, as opposed to advocacy itself).

[54] BELKNAP, *supra* note 23, at 68.

Medina became convinced that the defendants were intending to delay the proceedings for the purpose of ruining his health and gaining a mistrial.[55] As a consequence, he refused to allow the defense to present objections and argue motions, which prompted defense counsel to object ever more strenuously to the judge's apparent bias. Hundreds of people protested the trial by picketing outside the court building in Foley Square, which in turn prompted the dispatch of hundreds of New York police to circle the courthouse. The trial became known as the "Battle of Foley Square."[56] Alarmed by what looked like a spectacle, the conservative ABA House of Delegates passed a resolution in February 1949 (early in the trial) condemning the picketing of court buildings as a threat to the independence of the judiciary.[57]

In the face of judicial hostility and a prosecution determined to make the case an indictment of Marxism, it proved difficult to craft a strategy for defending a political case, and the lawyers and their clients did not find consensus on how to do it. Arthur Kinoy thought they should "turn the tables," "take the offensive," and use the courtroom to reveal "the real conspiracy," which was against the Left.[58] While everyone on the defense team agreed, he thought, "that the Constitution itself prohibited the trial of the defendants, and that the defense of the Constitution and the needs and interests of millions of Americans required a repudiation of these criminal charges,"[59] they did not agree how to prove that in court. Gladstein lamented that there was no chief counsel on the case to make decisions.[60] Gladstein felt he was the most skilled trial lawyer, even though Sacher was older and had longer experience in the labor movement.[61] Maurice Sugar, the most senior of the lawyers and who had experience both in trials and in political cases,

[55] *Id.* at 68-69.

[56] *Id.* at 100-01 (listing instances when Judge Medina was hostile toward the defense, refused to let defense lawyers call or question witnesses or argue objections, threatened to imprison them, and tolerated the prosecution's use of the trial to get witnesses to name names of suspected communists).

[57] BELKNAP, *supra* note 23, at 219.

[58] KINOY, *supra* note 50, at 77.

[59] *Id.* at 78-79.

[60] Gladstein Interview, *supra* note 48, at 14-15.

[61] *Id.* at 13-14.

was supposed to resolve the differences between Sacher and Gladstein but, Gladstein said, although Sugar was "a very sweet and able guy," the clients were not willing to choose who should call the shots.[62]

Gladstein attributed the conflict, in part, to the distinct culture of the progressive movements in the west and the east.

> I thought my main difficulty with all the other lawyers was that I was from the West and they had never known or experienced what it was like to be the beneficiary of a western movement that had a certain element of freedom and of individuality and of brashness, perhaps.[63]

With the benefit of hindsight, Gladstein responded to the criticism that the lawyers lost control of their clients by insisting, "I felt that the only way to go before that judge and jury was as though we were going to win . . . . [W]e were going to be presenting our people as exponents and champions of freedom, and not hide behind technicalities. Well, I got nowhere at all with that."[64] In short, he attributed his legal tactics and beliefs to his experience in the progressive labor movement of the West, one that he thought tolerated spirited debate but also recognized the importance of deferring to expertise when it made strategic sense. He also felt that he was unable to practice his craft, especially cross-examination, because of his clients' "orders and requirements and demands and exclusions and prohibitions and you must ask this and you must not ask that."[65] He felt that much client control made his work unduly difficult. "[T]his is just not possible for a creative person who finds it necessary to engage in combat – live combat with the witness."[66]

Others insisted that the defendants deferred too much to the lawyers. Arthur Kinoy was in this camp, and indeed his view that lawyers must align themselves closely with movement activists shaped the rest of his career. He condemned the "natural impulse of experienced lawyers to

[62] *Id.* at 14; *see also* Christopher H. Johnson, Maurice Sugar: Law, Labor, and the Left in Detroit 1912–1950, at 71-72, 103-07 (1988).

[63] Gladstein Interview, *supra* note 48, at 4, 14.

[64] *Id.* at 4-5.

[65] *Id.* at 10.

[66] *Id.*

assume for themselves the protagonist role in the courtroom struggle."[67] As he saw it,

> [T]he powerful people's movements of the thirties and forties were on the defensive, and no political strategy of counterattack was even being considered. One of the results was an almost total dependence upon the formal legal defense put up by lawyers to each new attack. This in turn encouraged an overreliance upon the legal structure itself.[68]

In Kinoy's view, the problem was not too little reliance on lawyers, but too much, and the Left did too little to arouse public opposition to the trial.

Whether lawyers did too little or too much, many of the defendants and lawyers in every city where the government launched a Smith Act prosecution were convinced (correctly, as it turned out) that they could not win a show trial in the courtroom and they used the cases to mobilize the public to condemn the growing repression of leftists. When the government prosecuted Detroit labor activists under the Smith Act in 1954, the union lawyers who handled the defense, George Crockett, Jr., and Ernest Goodman, used every connection they had to rally support for the defendants. They helped form the Civil Liberties Appeal Committee to raise money for the defense, corresponded with lawyers across the country handling Smith Act cases and with committees raising money for those.[69] They urged the huge UAW Local 600 to organize a letter-writing campaign to urge the U.S. Attorney General to drop the case. The union did so, explaining that the FBI was using the Smith Act to revive the system of labor spies and surveillance of union members and meetings that had supposedly been outlawed by the NLRA

[67] KINOY, *supra* note 50, at 80, 82.

[68] *Id.* at 89.

[69] The Goodman and Crockett papers are in the Ernest Goodman Collection at the Walter P. Reuther Library at Wayne State University in Detroit ("EG-WPRL"). The citations are to the box and folder. Copies are also on file with the author. Letter from Steve Nelson to George Crockett, Jr. (Oct. 16, 1956) (on file in EG-WPRL, Box 5, Folder 8); Letter from Jack Raskin to Ernest Goodman (Apr. 11, 1957) (on file in EG-WPRL, Box 5, Folder 9); Letter titled "Dear Friend of Civil Liberties" (n.d.) (on file in EG-WPRL, Box 5, Folder 12) (appealing for support for the Liberties Appeal Committee for Michigan Smith Act Defendants).

in 1935. Referring to the government's support for the school desegregation cases, Local 600's letter argued: "The threat to freedom of speech and assembly involved in the Smith Act is as grave as is the threat which the various school segregation statutes presented."[70] They argued that civil liberties and civil rights were "inseparable," and sent circulars explaining the connection that the efforts of Black people, like trade unionists more generally, must be able to join groups and express ideas to assert their rights to freedom and equality on the job and in society.[71] Various UAW locals wrote letters both to the Attorney General and to their members, explaining the harms of the Smith Act to ordinary people and to the ability of workers and civil rights activists to speak freely and peaceably on matters of public concern.[72]

A few years later, during the Smith Act prosecution in Los Angeles, the defense lawyers learned from the experience in *Dennis*. One of the Los Angeles lawyers, Ben Margolis, drew a distinction between the political and legal strategy they used, which made lawyers full partners with the defendants, and the strategy used in New York, which left the clients in control:[73]

> In New York, the defendants decided virtually every, every question, and determined how it should be done. . . . And the decisions were made very often without even any participation from the attorneys. It was deeply resented by many of the attorneys. They felt that they couldn't — and indeed they couldn't — do their very best work under those circumstances. The situation in Los Angeles was the direct opposite. Decisions were made jointly. Many of the decisions had both — Virtually

[70] Letter from Carl Stellato, President, Local 600, to Solicitor Gen. of the U.S. (Feb. 13, 1956) (on file in EG-WPRL, Box 5, Folder 8); Letter from Ernest Goodman to Local 600 (Feb. 8, 1956) (on file in EG-WPRL, Box 5, Folder 8).

[71] "Civil Rights and the Smith Act," mimeographed 2-page statement issued by "Michigan Smith Act Defendants and Families Committee," Jan. 1956 (Box 5, Folder 12 EG-WPRL).

[72] Letter from UAW Local 351 to "All UAW Local [sic] in Michigan," Feb. 13, 1956 (Box 5, Folder 12 EG-WPRL).

[73] Interview by Michael S. Balter with Ben Margolis, in L.A., Cal., 357-58 (scattered dates between May 14, 1984–May 17, 1985) (notes on file with the author) [hereinafter Margolis Interview].

> all of the decisions of major import had both political and legal connotations. We used to discuss them and work them out and agree on how they should be handled. As a result of that, I think that we, the lawyers, were in a much better position to try the case well than were the New York attorneys.[74]

Still, whether or not the defendants were in conflict with their lawyers, it was hard to find a way to persuade jurors that communist literature and ideology deserved their sympathy. As Margolis recalled the Los Angeles trial, at which he was assigned the unenviable task of arguing the political theory, the jury neither understood nor cared about Marxism.[75] He thought the best argument was made by the Black lawyer on the team, a relatively young lawyer named Leo Branton, Jr., who "talked about the things that the Communist Party had done for the people, the black people. And he would say . . . such things as, 'This is what they did. Who else was willing to do that? And that's why they're in court here today.'"[76] Though there was no Black defendant nor any Blacks on the jury, lawyers defending Smith Act cases across the country believed it was crucial to identify the persecution of communists with their support for civil rights because the labor Left believed that the prosecutions were motivated both by the perceived threats of labor power *and* Black liberation.[77]

Nothing the lawyers did in any city seemed to make any difference to the outcome. Smith Act defendants were convicted everywhere the government prosecuted them, beginning in October 1949, when, after a nine-month trial, the Foley Square jury convicted all the defendants.[78] What was especially shocking to the lawyers and the legal community, however, came immediately after the jury was dismissed, when Judge Medina announced he was finding all five defense attorneys guilty of contempt of court and sentenced them to prison terms ranging from six months (for three), four months (for two) and thirty days (for one).[79]

[74] *Id.*

[75] *Id.* at 401.

[76] *Id.*

[77] *Id.*

[78] *See* Dennis v. United States, 341 U.S. 494, 495 (1951) (describing procedural history).

[79] Gladstein Interview, *supra* note 48, at 17.

Judge Medina declined to inform the lawyers exactly what was the basis for the contempt, and his sixty-page contempt specification (of which he read only a small part to the lawyers) referred to the 13,000-page trial record as a basis. He refused to allow them to challenge the sufficiency of the evidence of contempt or the legality of the contempt citations.[80]

The lawyers appealed their sentences as they appealed their clients,' but to no avail. The court of appeals, in a divided opinion, upheld the convictions of the defendants and the Supreme Court, over the dissents of Justices Black and Douglas, affirmed in June 1951.[81] Meanwhile, the divided Second Circuit affirmed the contempt judgment and on March 10, 1952, the Supreme Court affirmed, over the dissents of Justices Black, Frankfurter, and Douglas.[82]

On April 24, 1952, all the lawyers voluntarily surrendered themselves in New York City.[83] The government refused Gladstein's request that he be allowed to surrender in San Francisco, thereby forcing him to pay his own travel expenses to New York, where he was put in manacles and leg irons for a seven-week drive to Texarkana. Sacher, who asked to serve his sentence in the east near his family instead was sent to Ashland, Kentucky, along with George Crockett who was Black and had asked not to be confined in a Southern prison for fear of violence.[84]

Lawyers on the Left had been held in contempt scores of times before, often when they accused prosecutors and judges of seeking to prosecute labor activists for the purpose of intimidating the labor movement. Indeed, Gladstein's law partner, George Andersen, was cited for contempt twice in 1936 for saying in court that a prosecution of labor activists was funded and urged by the employers and that the district attorney was pressuring jurors.[85] But sentencing lawyers to federal prison for a spirited or even obstreperous defense of a political case was still shocking and sobering.[86] One of the *Dennis* lawyers, Abe Isserman,

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80 Sacher v. United States, 343 U.S. 1, 14 (1952) (Black, J., dissenting) (describing the hearing at which Judge Medina imposed the contempt sanction).

81 *Dennis*, 341 U.S. at 517.

82 *Sacher*, 343 U.S. at 13-14.

83 KUTLER, *supra* note 23, at 164.

84 *Id.*

85 WARK & GALLIHER, *supra* note 38, at 58.

86 Gladstein Interview, *supra* note 48, at 18-19.

spent twelve years seeking readmission to the bar because a New Jersey judge insisted on denying reinstatement (for a time he was, quipped another lawyer, the only lawyer in the country who was admitted to practice only before the U.S. Supreme Court and nowhere else).[87] The more the government or business used courts to repress labor activism, the more union lawyers had to choose between what elites in the organized bar considered proper decorum and what the labor movement considered essential to mobilize workers to fight for the right to protest.

II. THE CONSEQUENCES FOR SMITH ACT DEFENSE COUNSEL

Sending the defendants and their lawyers off to prison at the conclusion of what was obviously a political trial sent shockwaves through lawyers on the Left, but not through the rest of the bar. Between 1950 and 1953, the ABA adopted a series of resolutions urging that communists be banned from the practice of law.[88] When the government instituted Smith Act prosecutions of suspected communists in cities throughout the United States after winning at Foley Square, defendants reported asking scores or hundreds of lawyers for representation and finding no one who would take the case.[89] Prosecutions were delayed (in Cleveland, for example, by two years) as defendants struggled unsuccessfully to find lawyers, and the unwillingness of lawyers to represent the defendants became an annoyance to the courts and an embarrassment to the bar.[90] Between late 1953 and 1955, the Philadelphia, Denver, and Cleveland bar associations participated in assembling teams of large firm lawyers to handle the defense of Smith Act cases in those cities.[91] These bar associations were not terribly brave by recruiting large firm lawyers to

[87] *In re* Isserman, 348 U.S. 1, 1 (1954); Gladstein Interview, *supra* note 48, at 28; Margolis Interview, *supra* note 73, at 139.

[88] *See* Norbert C. Brockman, *The History of the American Bar Association: A Bibliographic Essay*, 6 AM. J. LEGAL HIST. 269, 282-85 (1962) (describing the various anti-communist efforts of the ABA in the 1950s).

[89] BELKNAP, *supra* note 23, at 222; KUTLER, *supra* note 23, at 182 (reporting that one defendant proceeded pro se after over a hundred lawyers turned him away).

[90] BELKNAP, *supra* note 23, at 222.

[91] *Id.* at 224-26.

handle the defense of Smith Act cases because, as suggested by the censure of Senator McCarthy in 1954, public opinion on civil liberties had begun to turn against some of the most extreme abuses of legal process to target suspected communists or fellow travelers.[92]

Representing accused communists had significant consequences for the progressive labor lawyers who jumped into the fray. Ben Margolis, who represented the Los Angeles Smith Act defendants, struggled to find lawyers who were willing to help. He recalled what happened when he received an early morning phone call from his client, a long-time labor organizer and California Communist Party leader named Dorothy Healey, saying that she and other local leftist leaders had been arrested. "I was looking particularly for some lawyer or lawyers who were less labeled [as communist sympathizers] than I and the people in my office were" even just to help with a motion to get the accused released on bail.[93] But none of the many lawyers he called would help. "The fear was just pervasive."[94] So Margolis pressed on alone until, on the day he went to argue the bail motion, a fellow member of the National Lawyers Guild appeared at the court to help. The lawyer explained, "I just couldn't refuse to do this. [. . .] I have the obligation to do it, and I was going to do it, regardless of the consequences."[95] The consequences were severe. His clients deserted him, his law firm fired him, and, Margolis said bitterly, "for the rest of his life, [he] had a relatively difficult time making a living."[96]

Lawyers who represented the ILWU or other unions that left the CIO had a somewhat easier time staying in practice because their clients stuck by them, but even so, there were difficulties. The ILWU's Executive Board, as Gladstein put it, specifically approved that their general counsel should "participate in a defense of what was considered by us to involve the civil rights and liberties of the people,"[97] but the controversy about the way that the lawyers and clients handled it resulted in Gladstein's firm losing clients and all the lawyers

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[92] *Id.*

[93] Margolis Interview, *supra* note73, at 332.

[94] *Id.* at 333.

[95] *Id.*

[96] *Id.* at 334.

[97] Gladstein Interview, *supra* note 48, at 3.

experiencing "some serious professional and financial losses."[98] Even before he went to jail, Gladstein recalled later,

> there was a period of about a year when I was more or less in purgatory. For one thing I had to give up defending Harry Bridges and his criminal case because it would obviously be to his detriment to have Richard Gladstein, who had just been convicted of contempt in a case involving communists come and defend Harry whose defense was that he was not a communist.[99]

The struggle was personal too. Friends in labor and the Left didn't quite shun him, "but they didn't go out of their way to" see him either.[100] It was, Gladstein remarked ruefully to his wife, "a pretty rough year." But, all in all, he reflected, "[W]ould I do it again? I would, but not for the same people."[101]

Indeed, as Gladstein pointed out, he did handle another Smith Act case just a couple of years later, when the U.S. government indicted seven labor-left activists, including the ILWU Regional Director, in Hawai'i.[102] And that was a very different experience, one that satisfied his ego, or his devotion to the craft of good lawyering, or both. "Those seven people needed my help. . . . I knew them and they begged me to come and they gave me every opportunity to do a job and I did a job, a hell of a job. . . . They didn't tell me what to do."[103] Gladstein's fond recollections centered on the craft of cross-examination. "There was no witness that the government put on that I didn't destroy."[104] He boasted about his skill in discrediting government witnesses through cross-examination. In another case where Gladstein represented someone who allegedly fled rather than face a Smith Act trial, the government sought to use a fingerprint to prove the client had been in hiding.[105] "But the chief fingerprint expert from Washington, D.C.," Gladstein crowed,

[98] *Id.* at 4.
[99] *Id.* at 30.
[100] *Id.*
[101] *Id.* at 30, 33.
[102] *Id.* at 34.
[103] *Id.*
[104] *Id.*
[105] *Id.* at 36-37.

was forced to admit on cross examination that the government could have fabricated the evidence.[106] "When I got through with the rills, the ridges, the this and all the rest of that business," Gladstein proudly declared, the federal prosecutor in the case, who by then had become a federal judge, "will tell you if you went to him — that this was the most brilliant cross examination he had ever heard."[107]

Courtroom victories were more than a point of pride among the lawyers, they were an organizing tactic to convince union members and other supporters that the lawyers and defendants were fighting back. In the Smith Act trial in Detroit, former UAW lawyer Goodman got government witnesses to admit on the stand that they had lied about being paid informers for the FBI and labor spies for the employers.[108] Goodman's network of labor, civil rights, and civil liberties activists then publicized the courtroom triumphs to union members, civil libertarians, and anyone who was supporting the defense, printing and circulating pamphlets recounting the incidents of perjury and the judge's post-verdict comments critical of the perjury. The Michigan pamphlet reported, with evident dismay, that the district attorney refused to consider prosecuting the witnesses for perjury because of what the DA vaguely called "extenuating circumstances."[109]

In some respects, the persecution of lawyers made them more determined to fight back. As labor and civil rights lawyer George Crockett said, by 1953 "I'd become at that time an unreconstructed rebel. It's interesting when you go to prison what happens to you. If you go to prison unjustly you have nothing to be ashamed of. Instead, you have everything to be proud of."[110] On the day the Supreme Court had upheld his contempt conviction for his defense of the communist leaders in the 1949 Foley Square trial, Crockett was engaged in

[106] *Id.*

[107] *Id.*

[108] BABSON ET AL., *supra* note 49, at 261.

[109] *These Government Witnesses Lied Under Oath At the Smith Act Trial of Six Michigan Citizens*, LIBERTIES APPEAL COMM. FOR MICH. SMITH ACT DEFENDANTS, [hereinafter EG-WPRL].

[110] Oral History Interview by George W. Crockett, Jr. with James Mosby for the Civil Rights Documentation Project, Moorland Springarn Research Center, Howard University (July 9, 1970) (reviewing notes on the manuscript and not the original manuscript itself).

representing people who had been subpoenaed to testify before a subcommittee of the House Un-American Activities Committee ("HUAC") in Detroit. He and Goodman were representing most of the top leadership of UAW Local 600 and leaders of the Black civil rights community, all of whom had been subpoenaed to appear before HUAC.[111] The client who was set to testify just two days later, on March 12, 1952, was Elliott Maraniss, a journalist for the *Detroit Times*, who had been fired the day he received a subpoena from HUAC.[112] Although the HUAC chair had previously admonished Crockett for speaking to the committee on behalf of his clients, by this point Crockett was so furious that he pushed back, knowing he was going to prison anyway. When Rep. Wood insisted that the invoking of the Fifth Amendment was an admission that Maraniss was a communist and the public was "entitled to know" it, Crockett shot back, "[t]he public isn't entitled to know anything that you may properly claim a privilege from disclosing under the Fifth Amendment."[113]

But before the Supreme Court significantly narrowed the applicability of the Smith Act in a series of cases between 1957[114] and 1961,[115] the careers of many lawyers were significantly damaged or derailed. Even after serving their sentences, some of the lawyers for the Foley Square defendants spent years battling disbarment. Harry Sacher and Abraham Isserman spent over a decade defending disbarment proceedings and it was not until 1961 that Isserman finally regained admission to the bar in his home state of New Jersey.[116]

[111] LITTLEJOHN & HAMMER, *supra* note 49, at 118.

[112] *Id.*

[113] *Id.* at 119.

[114] Yates v. United States, 354 U.S. 298, 298 (1957).

[115] Noto v. United States, 367 U.S. 290, 290 (1961) (finding insufficient evidence to sustain Smith Act conviction of communist for illegal advocacy of violent overthrow).

[116] JEROLD S. AUERBACH, UNEQUAL JUSTICE 245-46 (1976); *see* Sacher v. Ass'n of the Bar of N.Y., 347 U.S. 388, 389 (1954) (reversing disbarment from the Southern District of New York).

George Crockett worried about the implications for civil rights lawyers. In an interview with acclaimed Black writer Lorraine Hansberry published in the Black journal *Freedom*, he explained his concern:[117]

> A Negro lawyer will have to think twice before he presses any legal points for his client. In the back of his mind will always be this Supreme Court ruling which means he can be sentenced without a chance for defense or argument and sent to jail. The result of the ruling is to produce another source of intimidation to the Negro's fight for civil rights.[118]

And in a letter to Dr. Benjamin Mays, the President of Morehouse College, who had expressed concern about Crockett's involvement in the Foley Square trial, Crockett explained that Judge Medina had held him in contempt for

> ordinary court room activity engaged in every day by lawyers who defend vigorously the rights of their clients. What happened to me is likely to happen in any case where such a lawyer is confronted with a hostile judge and is defending an unpopular client in a hostile community. It requires no great deal of imagination to see how the precedent in my case might live on to hound lawyers — especially in the South — who have courage enough to defend in court the rights of their Negro clients.[119]

In the most general sense, the courts' unwillingness to recognize that the Constitution protected lawyers and clients was dispiriting for lawyers who believed in the rule of law. In February 1952, just as Crockett was leaving Detroit to report to prison, Michigan enacted a statute making it a crime, punishable by ten years in prison, to fail to register as a communist, a term defined to include affiliation "notwithstanding the fact he may not pay dues to or hold a card in said party," but that also made anyone who registered subject to immediate

[117] Lorraine Hansberry, *Noted Lawyer Goes to Jail; Says Negroes' Fight for Rights Menaced*, 2 FREEDOM 1, 3 (1952), https://lorrainehansberryproject.substack.com/p/yanqui-imperialismo-eight-articles [https://perma.cc/KN9Y-TDRK].

[118] *Id.*

[119] LITTLEJOHN & HAMMER, *supra* note 49, at 119-21.

arrest and detention.[120] Crockett and his law partner, Ernest Goodman, were about to seek a preliminary injunction against the law and had found new co-counsel, Joseph A. Brown, who was Michigan's first Black state senator, to take Crockett's place in the litigation.[121] Goodman recalled standing with Crockett by the window in their office in Cadillac Tower overlooking the Detroit River and Belle Isle.

> I felt such a sadness, as if everything was going to hell. We seemed completely incapable of getting a handle on the massive problems that had been pushed down on us. . . . The Constitution hadn't worked for George and, by coincidence, we were on our way to federal court to seek the protection of the same Constitution. It seemed that something important was happening in our lives. In a way, we were going to court for George, trying to tell him that we weren't going to give up. We put on a good front, "smart-assed" a bit, and told George we would take care of things while he was gone. We said good-bye and left for court. George went off to prison. That was it.[122]

III. USING SMITH ACT PROSECUTIONS TO REVERSE UNION ORGANIZING GAINS

After the government's success in New York, government lawyers fanned out across the United States between 1951 and 1956 to arrest and prosecute alleged communists in cities across the country, including New York, Los Angeles, Baltimore, Pittsburgh, Honolulu, Detroit, Seattle, St. Louis, Philadelphia, Cleveland, Hartford-New Haven, Boston, and Denver.[123] Smith Act prosecutions were not only trials of leftist ideology, they were, and were perceived as being, a government effort to crush radical multiracial labor organizing.

Hawai'i is a case in point. Between 1944 and 1947, the ILWU had supported a longstanding unionization effort of Hawaiian workers of many languages, races, ethnicities, and nationalities, from the docks to

[120] *Id.* at 124-27.

[121] *Id.* at 125.

[122] *Id.* at 127.

[123] Robert Mollan, *Smith Act Prosecutions: The Effect of the* Dennis *and* Yates *Decisions*, 26 U. PITT. L. REV. 705, 709-10 (1965).

the sugar and pineapple plantations.[124] Under the banner of the ILWU, workers were poised to transform the power structure in the islands. The Smith Act prosecution aimed squarely at the ILWU leadership. The five interlocking companies that controlled the entire private sector economy, from the ports to the plantations, believed that via the Smith Act prosecution and Taft-Hartley restrictions on union protest, the union would be smashed.[125]

The government arrested and indicted seven ILWU activists in Hawai'i. They included Jack Hall, the ILWU regional director, who was arrested at 6:30 a.m. in the midst of strikes of pineapple and sugar workers across the islands; indeed, Hall was arrested after a marathon all-night negotiation session to settle the sugar strike.[126] Others arrested included John Reinecke, who had been active in labor circles for years; Charles Fujimoto, a soil chemist who was the Communist Party chair in Hawai'i, and his wife Eileen, who had worked as an administrative assistant for the ILWU; labor organizer Dwight James Freeman; and two writers for the left-wing *Honolulu Record*, Jack Kimoto and Koji Ariyoshi.[127]

Union activists were convinced that the prosecution was motivated by a desire to break the union; the challenge was to prove it. When the FBI sent two agents to speak to the ILWU's David Thompson at home to get information on Hall and the union in January 1952, Thompson saw a chance to get the evidence they needed to show that the prosecution was aimed at smashing the union.[128] He and another ILWU activist arranged to record the conversation by running a wire from the living room radio out a window and down to a tape recorder in the

[124] *See generally* GERALD HORNE, FIGHTING IN PARADISE: LABOR UNIONS, RACISM, AND COMMUNISTS IN THE MAKING OF MODERN HAWAI'I (2011) (describing the role of communists and labor organizing in changing the racial repression of labor in Hawai'i); SANFORD ZALBURG, A SPARK IS STRUCK: JACK HALL & THE ILWU IN HAWAII (2007) (describing the ILWU organizing campaign in Hawai'i).

[125] *Fight to Finish Seen for ILWU*, COOS BAY TIMES, Mar. 11, 1955 (quoting a speech of Pacific Maritime Association lawyer to Chamber of Commerce regarding Taft-Hartley litigation against ILWU); Interview by Lucille Kendall with Louis Goldblatt, in S.F., Cal. (Nov. 7, 1979); *see* ZALBURG, *supra* note124, at 324.

[126] *See* ZALBURG, *supra* note124, at 323.

[127] *Id.*

[128] *Id.* at 334.

basement.[129] The recording captured the agents saying that if Hall cooperated, the FBI would "see if it couldn't be straightened out whereby it would be six instead of seven" people on trial.[130] Trying to get the agents to admit the government's anti-union motive, Thompson said Hall believed the government knew he wasn't a communist and was only prosecuting Hall as a way to go after the union. The agent concurred, saying "Oh, he's convinced of that, too, huh?"[131] They confirmed Hall was, indeed, the prime target and the others "would make poor Communists in the lowest cell in California but they're the guys who are the leaders of the Communist Party here and so we're stuck with them."[132]

The Union accused the government of arresting Hall in the midst of negotiations and two major strikes to "torpedo negotiations, and force the union to settle for any terms offered by the employer."[133] Management insisted they didn't want Hall arrested because in dealing with Hall, "a guy who is straightforward and tells you the truth — no matter how tough he is — you're in a better position than you are with somebody you can't rely on."[134] In any case, the fifty-member union negotiating team refused to continue without Hall. Both management and the union were eager to settle the strikes, so the negotiating committee met with Hall in the U.S. Marshal's office at the federal building to work out strategy.[135]

Whether or not management wanted to be able to negotiate with Hall, the acting United States Attorney apparently did not and asked that bail be set at $75,000 (about $871,000 in 2023 dollars).[136] That, ILWU lawyer Myer Symonds argued, was tantamount to denying bail altogether because Hall was paid only $100 a week pursuant to the ILWU's policy that union leadership be paid no more than the best paid dockworker.[137]

[129] *Id.*

[130] *Id.* at 335.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 324.

[134] *Id.* at 324 n.2.

[135] *Id.* at 324.

[136] *Id.*

[137] *Id.* at 325.

Judge Delbert Metzger lowered bail to $5,000.[138] This prompted the prosecution to seek to recuse him.[139]

At the same time, the ILWU's other Hawai'i lawyer, Harriet Bouslog, challenged the indictment on the basis that the grand jury excluded nonwhites.[140] Judge Metzger agreed about the grand jury and discharged them, but declined to dismiss the indictment.[141] The other judge in Hawai'i, Frank McLaughlin, then took over the case — according to the court's normal rotation of the criminal calendar among the judges — and promptly called Judge Metzger as a witness to testify about the basis for his ruling.[142]

The public disagreement between the judges prompted a private disagreement among defense counsel about whether to seek recusal of Judge McLaughlin. Symonds opposed it, but Gladstein, who had flown in to work on the case, along with Bouslog and Hall, favored it.[143] McLaughlin himself resolved it by stepping aside. Bouslog suspected he did so because the chief judge of the Ninth Circuit was eager to avoid ruling on the appeal of the recusal motion and called McLaughlin on the phone to urge him to recuse.[144] This was only one of a number of disagreements among Hall and his lawyers that grew increasingly bitter as the proceedings dragged on. Hall wanted to sever his trial from that of the other defendants, as he insisted the case against him was an attack on the Union and a separate trial would allow it to be presented as such. Hall complained that Symonds had failed to "set the tenor of the case which is primarily, as I thought we had agreed, an attack on the ILWU, and secondarily, a civil liberties case."[145]

The legal team of Gladstein, Symonds, Bouslog, and Abraham Lincoln Wirin, counsel for the ACLU of Southern California, which Hall

[138] *Id.*

[139] *Id.* at 327.

[140] The various drafts of her briefs, and the exhaustive research she conducted to support the argument, are in the HB Papers in Honolulu. *see also* Barbara J. Falk, *Harriet Bouslog: Labor Attorney and "Champagne Socialist,"* 50 HAWAIIAN J. HIST. 103, 116 (2016).

[141] United States v. Fujimoto, 107 F. Supp. 865, 866-67 (D. Haw. 1952).

[142] ZALBURG, *supra* note 124 at 328.

[143] *Id.*

[144] Harriet Bouslog Recollections — Transcript of Tapes Bunder # 1 Tapes 1-36, at Tape 3-4.

[145] ZALBURG, *supra* note 124, at 330.

described publicly as "a formidable array of legal talent," was not Hall's first choice.[146] He objected to having Gladstein lead the defense because of Gladstein's contempt citation in the Foley Square trial. So did the government, which moved shortly before trial to disbar him from the federal court in Hawai'i. The motion was denied, and Gladstein continued on the team.[147]

The trial, which began in early November 1952, began with the usual Smith Act parade of former communists who testified for the prosecution about the goals of the Party. Government lawyers read Marx and Lenin to the jury. The judge sustained so many prosecution objections and so few defense objections that finally defense counsel moved for a mistrial. Developing a strategy to counter judicial bias and prosecutorial overreach engendered some of the same conflicts among lawyers and clients as in other Smith Act cases. When the judge denied the recusal motion, Hall fumed that the lawyers had mishandled it. "All the lawyers except Harriet seem most reluctant to join the issue," he complained, and "Richie [Gladstein] is getting very difficult and, of course, most of the defendants hero-worship him and defer to his judgment — which in some situations is tinged with the romantic."[148] Reinecke, one of the other defendants, thought Gladstein was effective, though "a little doctrinaire." Wirin was "not a good courtroom lawyer." Symonds had good rapport with the jury, but Harriet? "She tends to talk too much." Too much seemed to Bouslog to be very little at all. She chafed at their male chauvinism, and at being confined to research, later saying that "None of them would let me say a goddamned thing."[149] Judge Wiig said that Wirin was the one who "talked a little too much" and whom he had "to slap down a little." Gladstein, the judge later said, was "extremely competent," "was under wraps at that time" because he'd just finished his prison sentence and maintained "decorum."[150]

While the trial dragged on in Honolulu, the ILWU membership on the plantations wanted to know what was going on. To show to the membership that the trial really was an attack on the union, it was

[146] *Id.* at 339, 342.

[147] *Id.* at 339.

[148] *Id.* at 346-47.

[149] *Id.* at 348 & n.3.

[150] *Id.* at 349.

necessary to explain it to them. Bouslog had delivered a fiery Labor Day speech criticizing the Smith Act prosecution as way to crush labor organizing and to stifle freedom not long after Hall was first arrested, so it was easy for her to reprise that speech.[151] On a Sunday morning in December, about six weeks into the trial, Hall asked Bouslog to speak to a meeting of union members at a pineapple plantation village at Honokaa on the island of Hawai'i.[152] "We want to give them an idea what's going on in the trial. Try to talk in a way they'll understand."[153] She did, and spoke extemporaneously for about half an hour. Yoshio Matsuoka, a reporter for the anti-union Hilo *Herald Tribune*, attended the meeting.[154] What Bouslog said was hotly disputed in later legal proceedings, as Matsuoka claimed to have lost his original notes and reconstructed them, from memory, at the direction of his editor "probably" in the week afterward, though he said he thought he gave his notes to the FBI.[155] Bouslog and Hall distrusted his account of what she said for many reasons, including the absence of contemporaneous notes and the fact that during the trial Matsuoka left the newspaper to work for an employer group, the Hawaii Sugar Planters Association.[156]

Matsuoka asserted Bouslog said that the Honolulu trial was an effort to get at the ILWU, which she did not dispute.[157] Nor did she dispute saying that the defendants were being criminally prosecuted for reading books written before they were born. Matsuoka claimed Bouslog had said the government spent two days of the trial reading aloud from books that one witness testified he had seen in a duffel bag that belonged

[151] Falk, *supra* note 140, at 108 & n.19 (2016) (quoting Harriet Bouslog, *Fear* (a pamphlet published by the ILWU in Honolulu in 1951)).

[152] Harriet Bouslog Oral History, Tape 22-4 (transcription in HB Papers) [hereinafter Bouslog Tape].

[153] ZALBURG, *supra* note 124 at 284-285.

[154] *Id.*

[155] Summary of Transcript of In re Harriet Bouslog Sawyer, Hearings Before Legal Ethics Committee of the Hawaii Bar Association, Nov. 22–Dec. 8, 1954, (transcription in HB Papers).

[156] *Id.*; *see* ZALBURG, *supra* note 124, at 284-285.

[157] The account of what Bouslog said and how she responded to the bar disciplinary proceedings are drawn from the sources cited *infra* notes 166–170, and from *In re* Sawyer, 360 U.S. 622, 628-30, 640-46 (1959). A version of Matsuoka's notes is printed as an Appendix to Justice Brennan's opinion for the Court. *Id.* at 640-46.

to one of the defendants. This, she said, showed that "[u]nless we stop the Smith trial in its tracks here there will be a new crime. People will be charged with knowing what is included in books — ideas." Moreover, she condemned the government's use of conspiracy charges in Smith Act cases to overcome a lack of evidence that any of the defendants had done anything criminal. "Conspiracy," Bouslog said, "means you charge a lot of people for agreeing to do something you never have done." The most incendiary thing Bouslog said was that the judge allowed a witness to testify about a conversation he claimed to have overheard twenty-seven years before when, she pointed out, the defendant was only five years old. This, she said, showed "[t]here's no fair trial in the case. They just make up the rules as they go along."

Two days later, Judge Wiig summoned Bouslog to court and asked her about these comments. She protested that she had paraphrased for a lay audience, and that her remarks were critical of the prosecution, not the court, a view that the Supreme Court ultimately adopted.[158] Judge Wiig was not mollified. He directed the U.S. Attorney to open an ethics investigation of Bouslog.[159] Bouslog objected that it was inappropriate for the judge presiding over a case she was defending to direct her opposing counsel to conduct an ethics investigation into her, but the judge dismissed her arguments by saying the ethics investigation could wait until the trial was over.[160]

After a seven-month trial, the jury deliberated for two days and convicted all seven defendants in June 1953.[161] The ILWU struck for one day to protest the verdict.[162] Judge Wiig doubled the bond. The ILWU posted Hall's immediately, bringing $15,000 to court in bundles of $50 and $100 bills.[163] The other defendants spent a week in jail while the lawyers and friends scrambled to raise the $90,000 to free them;

[158] *In re* Sawyer, 360 U.S. at 632 (reasoning that criticism of the law "simply cannot be equated with an attack on the motivation or the integrity or the competence of the judges").

[159] *In re* Sawyer, 260 F.2d 189, 191 (9th Cir. 1958).

[160] *Id.* at 210.

[161] *See* United States v. Fujimoto, 107 F. Supp. 865, 866 (D. Haw. 1952) (declining to dismiss indictment); ZALBURG, *supra* note 124, at 294.

[162] ZALBURG, *supra* note 124, at 295.

[163] *Id.* at 297.

Harriet's husband was one of the four who used real estate to secure the bond.[164] Hall's lawyers had to file a motion asking permission of the judge every time Hall wanted to leave the island of Oahu, even just to go fishing (a newspaper headline read: "Hall Can Go Deep-Sea Fishing — But Not Too Deep").[165] It wasn't until January 1958 that the Ninth Circuit finally reversed the convictions,[166] in reliance on the June 1957 Supreme Court ruling in *Yates v. United States*.[167]

After the defendants had been convicted, the U.S. Attorney turned his attention to the ethics investigation of Bouslog for the Bar Association of Hawai'i's Legal Ethics Committee.[168] Bouslog, who had tangled with Judge McLaughlin in workers' rights cases before, blamed him for pressing for the ethics case against her.[169] Proceeding against Bouslog required the Bar Association to change its rules because nobody had complained about her conduct other than Judge Wiig.[170] To Bouslog, this was just further proof that the government would make up new rules in order to go after anyone who challenged the power structure in Hawai'i.[171] The journalist Matsuoka's recollection of what his notes had contained was the principal evidence that Bouslog had improperly impugned the judge's impartiality and integrity.[172] Bouslog argued that her criticism of the Smith Act at the union meeting was protected by the First Amendment because it was her right and her obligation as a union lawyer to explain the law to the workers the ILWU represented. She found a hostile reception in the courts and even in her own defense

[164] *Id.* at 298.

[165] *Id.* at 321, 326.

[166] Fujimoto v. United States, 251 F.2d 342, 342 (9th Cir. 1958).

[167] 354 U.S. 298 (1957).

[168] *In re* Sawyer, 360 U.S. at 624.

[169] Bouslog Tape 4-3.

[170] *In re* Sawyer, 360 U.S. at 624 n.2.

[171] Bouslog Tape 3-4.

[172] *In re* Sawyer, 260 F.2d 189, 198 (9th Cir. 1958), *rev'd*, 360 U.S. 622 (1959). A second charge was added based on Bouslog having spoken to a juror, after the trial, at the request of the juror's sister who said her brother's conscience was weighing on him for voting to convict Hall. *Id.* at 194. Ultimately, because the Hawai'i Supreme Court found that it was common practice for attorneys to interview jurors after a trial, the U.S. Supreme Court focused only on the union meeting speech, and finding it provided no basis for discipline, reversed the discipline. *In re* Sawyer, 360 U.S. at 638.

lawyer because most lawyers did not see their work in terms of mobilizing a movement.

As Gladstein had in his struggle against professional discipline arising from the Foley Square trial, Bouslog sought an eminent and conservative lawyer to represent her. J. Garner Anthony, of the Big Five law firm Robertson, Castle & Anthony, took on the task.[173] Anthony did not think much of Bouslog's speech. He wrote to her saying "had I been in Judge Wiig's place, I would have found you guilty of contempt and would have imposed sentence forthwith."[174] But he was more direct, as well as sexist and condescending, in a note he wrote to her law partner Symonds: "had I been in Wiig's place I would have spanked her fannie [sic] for sounding off about a pending case in which she was counsel."[175] But because Judge Wiig had not considered the matter sufficiently serious to constitute a contempt, Anthony thought, the Bar should do no more than recommend censure. Anthony concluded, "I doubt if much will come of the whole thing."[176]

Anthony proved to be wrong, although the proceedings moved very slowly. It was not until April 1956 that the Territorial Supreme Court ordered her suspended from practice for a year.[177] The Committee found, and the Territorial Supreme Court agreed, that Bouslog's speech violated the Canons of professional conduct by impugning the integrity of the judge and thereby creating disrespect for the courts.[178] The Ninth Circuit affirmed. After remarking disdainfully that Bouslog showed no remorse for her speech, the court said: "so long as she conceives that she has a right to litigate in a given case by day and castigate by night (or at recess) the very court, the honored place in which she is working . . . she does not deserve to practice law."[179] Bouslog discovered years later that after the Territorial Supreme Court upheld the discipline, Judge

[173] Memorandum from J. Garner Anthony to Harriet Bouslog regarding Bar Association Complaint (Dec. 14, 1954); Note from J. Garner Anthony to Myer Symonds (Dec. 14, 1954) (transcription in HB Papers).

[174] Memorandum to Harriet Bouslog, *supra* note 173, at 2.

[175] Note to Myer Symonds, *supra* note 173.

[176] *Id.*

[177] *In re* Sawyer, 260 F.2d at 196.

[178] *Id.*

[179] *Id.* at 202.

McLaughlin wrote to the Bars of Indiana and Massachusetts, where she was also admitted, notifying them that she had been disbarred, without notifying her so that she could respond.[180]

Bouslog was furious, and she was doubly so when Harry Bridges and George Andersen tried to talk her out of taking the case to the United States Supreme Court. Over drinks at the Waikiki Tropics, the bar across the street from the Royal Hawaiian Hotel that served as the informal satellite office of the hard-drinking group among the ILWU leaders, Bridges and Andersen badgered her, trying "to kick her into line," as Bridges put it, to drop the case.[181] Bridges said they were trying "to save poor Harriet."[182] But even as the pressure from her friends, colleagues, and clients made her start to cry, she refused to back down.[183]

In 1959, as the anti-communist fervor was waning and new members of the U.S. Supreme Court had greater enthusiasm for protecting civil liberties, the Court overturned the discipline.[184] In an opinion by Justice Brennan, the Court decided that what Bouslog said was "tame stuff" compared what dissenting judges or justices often say in criticizing the reasoning and results of opinions they disliked.[185] As Bridges said, "So she proved us wrong again."[186] Four justices dissented, in an opinion by Justice Frankfurter. They excoriated Bouslog for criticizing a judge at a union meeting. Frankfurter himself had once been a powerful advocate for the rights of labor, but in the decades between his activist past, he had voted upheld the constitutionality of draconian restrictions on unions. The intemperate tone of the dissent prompted Washington, D.C. labor lawyer Nat Witt to joke in Frankfurter's postscript to a letter congratulating Bouslog on the victory: "Don't worry about Felix. He's just old."[187] But she remained furious about it for years, not without reason. The Court did not address the serious First Amendment issues

[180] Bouslog Tape 3-4.

[181] ZALBURG, *supra* note 124, at 326.

[182] *Id.*

[183] *Id.*

[184] *In re* Sawyer, 360 U.S. 622, 640 (1959).

[185] *Id.* at 635.

[186] ZALBURG, *supra* note 124, at 327 n.4.

[187] Letter from Nat Witt to Harriet Bouslog (in HB Papers).

she raised.[188] Frankfurter had himself written extremely critically in *The Atlantic* about the judge presiding over the trial of Sacco and Vanzetti in the 1920s; he accused the judge of "misinterpreting" evidence and characterizing his ruling as "a farrago of misquotations, misrepresentations, suppressions, and mutilations."[189]

From the standpoint of a movement lawyer like Bouslog, it was sexist hypocrisy to suggest that she had done anything different than what Frankfurter had done when he was in her situation. She, like he, had criticized the abuse of criminal law to target union organizing by low-wage, workers. Unlike him, she had done it while explaining the law at a union meeting rather than in the pages of an elite national publication. What differed was that she was a practicing lawyer, not a Harvard Law professor, and the attack on her was the latest in a decade of attacks on radical unions and their lawyers. She and her union clients were vulnerable to the attack because they were not part of the elite, and because she was a woman and her union client was both radical and powerful.

CONCLUSION

Government persecution of labor radicals under the 1940 Smith Act dramatically transformed the jobs and lives of union lawyers. The government hit hard at lawyers who had the temerity to criticize the political prosecutions. Richard Gladstein, George Crockett, and the other lawyers in the Smith Act prosecution at Foley Square in 1949 were held in contempt of court and went to prison along with their clients. Harriet Bouslog, who defended union leaders in Hawai'i, faced bar discipline for speaking at a union meeting. They were shunned by friends and former clients. Bouslog was insulted in demeaning and sexist terms by her own lawyer. They were just a few among many whose

[188] *See* Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1615, 1612 (2009).

[189] *See* CLYDE E. JACOBS, JUSTICE FRANKFURTER AND CIVIL LIBERTIES 11-12 (1975) (noting that Dean Wigmore of Northwestern wrote in the Boston *Transcript* that Frankfurter had libeled Massachusetts justice and that the Massachusetts Bar ought not take the criticism lying down); Felix Frankfurter, *The Case of Sacco and Vanzetti*, ATLANTIC (Mar. 1927), https://www.theatlantic.com/magazine/archive/1927/03/the-case-of-sacco-and-vanzetti/306625/ [https://perma.cc/745R-U8T4].

lives and careers were altered by decades of hounding by the FBI, the Department of Justice, Congress, and the legal profession. Their experiences offered sobering lessons, often the wrong lessons, to other lawyers, unions, and civil rights groups. When thinking about why some in the labor movement tolerated, encouraged, or ignored racism and quiescence, it is important to reflect on why.

The experience of radical union lawyers recounted here between 1947 and 1960 differs most distinctly and most revealingly from other social movement organization lawyers whose stories have shaped the historical understanding of what it is to be a lawyer for a social movement. These were the years when unions had more institutional power and a larger membership than any other social movement organization in American history. But it was also a period when many unions and their members were on the defensive far more than on the vanguard of progressive change because those who were on the vanguard faced powerful repression. These lawyers and their union clients learned to be activists from the position of a defensive crouch.